266 N.C. App.—No. 2 Pages 142-242

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

SEPTEMBER 29, 2020

MAILING ADDRESS: The Judicial Department
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OF

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COURT OF APPEALS

CASES REPORTED

FILED 2 JULY 2019

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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Dog attacks—negligence per se—violation of municipal ordinance—general liability—no duty of care—In an action arising from a dog attack, the trial court properly granted summary judgment for defendant homeowner on a per se negligence claim that was based on an alleged municipal ordinance violation. The ordinance, which made the custodian of every animal liable for the animal, imposed no duty of care on custodians and thus could not serve as the basis for a negligence per se claim. **Parker v. Colson, 182.**

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Dog attacks—premises liability—dogs kept on sister's next-door property—sufficiency of control—In an action arising from a dog attack, the trial court properly granted summary judgment for defendant homeowner on plaintiff pedestrian's common law negligence claim that was based on premises liability. There was no evidence that defendant homeowner—who helped to provide food, water, and electricity for her brother's pit bulls, which were kept on their sister's next-door property—exercised any control over the manner in which the dogs were enclosed or released from their enclosure. Furthermore, the attack did not occur on defendant's property. **Parker v. Colson, 182.**

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where plaintiff executed a contract agreeing to divest himself of his interests in the parties' two limited liability corporations in exchange for various financial benefits, the trial court properly dismissed—pursuant to Civil Procedure Rule 41(b)—plaintiff's claim for breach of the implied covenant of good faith and fair dealing. The record showed that plaintiff received the benefits he bargained for under the contract. **Musselwhite v. Cheshire, 166.**

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Former business partners—agreement divesting corporate interests—unconscionability—involuntary dismissal—proper—In a dispute between former business partners, where plaintiff executed a contract agreeing to divest himself of his interests in the parties' two limited liability corporations (LLCs), the trial court properly dismissed—pursuant to Civil Procedure Rule 41(b)—plaintiff's claim alleging unconscionability. The record showed that the parties negotiated the contract upon the same information and on equal terms, plaintiff understood what he was signing, and plaintiff received hefty financial benefits in exchange for his LLC interests. **Musselwhite v. Cheshire, 166.**

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Motion to withdraw guilty plea—filed after sentence known—standard—manifest injustice—The correct standard for analyzing a trial court's denial of a motion to withdraw a plea when a defendant has been informed of his or her sentence but the sentence has not yet been entered is whether manifest injustice will result if the motion is denied—not the more lenient standard stated in *State v. Handy*, 326 N.C. 532 (1990), which permits withdrawal of a plea upon any fair and just reason put forth by a defendant. In this case, the trial court's denial of defendant's motion to withdraw his plea of no contest—in which nine charges were dismissed in exchange for his plea to three charges—did not cause defendant manifest injustice where defendant was competently represented by counsel, he had already received some benefits from the plea, and his reconsideration was not an outright claim of actual innocence. **State v. Lankford, 211.**

SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 6 and 20 (20th Holiday)

February 3 and 17

March 2, 16 and 30

April 13 and 27

May 11 and 25 (25th Holiday)

June 8

July None Scheduled

August 10 and 24

September 7 (7th Holiday) and 21

October 5 and 19

November 2, 16 and 30

BOBBY G. BOLES, ET AL., PLAINTIFFS
v.
TOWN OF OAK ISLAND, DEFENDANT

No. COA18-806

Filed 2 July 2019

1. Cities and Towns—sewer treatment district—assessment of fees—service availability—statutory authority

A town exceeded its statutory authority—pursuant to a session law allowing the creation of a sewer treatment district and the imposition of fees for the "availability of" sewer service—where the town assessed fees to owners of undeveloped parcels, because the sewer system was not available and ready for immediate use by those owners without extensive and costly steps.

2. Appeal and Error—preservation of issues—motion to amend complaint—ruling not obtained

A property owner who failed to obtain a ruling on his motion to amend or supplement his complaint against a town (for claims related to the assessment of fees for sewer service availability) did not preserve for appellate review any issue regarding his motion.

Judge COLLINS concurring in part and dissenting in part.

Appeal by plaintiffs from order entered 2 May 2018 by Judge James Ammons, Jr., in Brunswick County Superior Court. Heard in the Court of Appeals 17 January 2019.

Smith James Rowlett & Cohen LLP, by Norman B. Smith, for plaintiffs-appellants.

Parker, Poe, Adams, & Bernstein LLP, by Charles C. Meeker and Stephen V. Carey; and Crossley, McIntosh & Collier, by Brian E. Edes, for defendant-appellee.

ZACHARY, Judge.

Plaintiffs, owners of undeveloped parcels of property in Defendant Town of Oak Island, challenge the sewer service availability fees levied upon them pursuant to a 2004 local act enacted to help service the debt incurred in constructing Oak Island's sewer system. Plaintiffs argue that

the fees are unauthorized by statute, unconstitutional, and violative of certain tax principles. After careful review, we conclude that Oak Island exceeded its statutory authority by imposing the sewer service availability fees on Plaintiffs' undeveloped property that could not or does not benefit from the availability of Oak Island's sewer system. Accordingly, we reverse the trial court's order granting summary judgment in favor of Oak Island and remand for further proceedings.

I. Background

The Town of Oak Island constructed a sewer system at a cost of $140 million. In 2004, the General Assembly enacted a local act[1] designed to assist Oak Island[2] in reducing its resultant outstanding debt, which was approximately $117 million as of October 2017. 2004 N.C. Sess. Laws 117, ch. 96. Specifically, the General Assembly authorized Oak Island to "impose annual fees for the availability of sewer service within" its sewer treatment district. 2004 N.C. Sess. Laws 117, 117, ch. 96, § 3. The Session Laws authorize Oak Island to impose such sewer service availability fees upon the "owners of each dwelling unit or parcel of property that could or does benefit from the availability of sewage treatment" within the district. 2004 N.C. Sess. Laws 117, 117, ch. 96, § 4.

Oak Island's sewer lines run in front of each parcel of property on the island, both developed and undeveloped, and, according to Oak Island, its system "has the capacity and ability to serve all parcels, both developed and undeveloped." Oak Island began to assess sewer service availability fees against all properties within the district, both developed and undeveloped.

Beginning in fiscal year 2009,[3] owners of developed property began paying the availability fees via an additional charge reflected on their monthly sewer bills. Owners of undeveloped parcels began paying the availability fees on an annual basis in fiscal year 2010, with the fees appearing on their property tax bills. The total sewer service availability fees charged to each parcel thus far are as follows:

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1. "A local act refers to an act of the General Assembly that relates to one or more specific local governments." Frayda Bluestein, *Coates' Canons Blog: What Is A Local Act?*, UNC School of Government (April 6, 2010), https://canons.sog.unc.edu/what-is-a-local-act/.

2. The original 2004 Session Law applied only to Holden Beach, with the 2006 Session Law adding Oak Island to the same authority. 2006 N.C. Sess. Laws 85, 85, ch. 54, § 1. The 2010 Session Law added Caswell Beach. 2010 N.C. Sess. Laws 34, 34, ch. 29, § 1.

3. For the Town of Oak Island, a fiscal year runs from July 1 through June 30.

Fiscal Year	Developed	Undeveloped
2010	$733.26	$146.15
2011	$435.46	$146.15
2012	$324.63	$139.13
2013	$490.81	$576.00
2014	$657.61	$643.68
2015	$714.78	$719.31
2016	$559.74	$803.83
2017	$562.28	$803.83

These recurring sewer service availability fees are in addition to a one-time special assessment of $4,200.00, which was imposed upon all parcels of property at the outset of the sewer system's establishment. It is also noteworthy that for the years 2015 through 2017, owners of undeveloped lots were paying more than the owners of developed lots that were connected to and using the sewer system.

On 11 December 2015, Plaintiffs filed the instant action challenging Oak Island's statutory authority to assess the sewer service availability fees against Plaintiffs' undeveloped property. Plaintiffs sought to recover the fees paid from 2010 to 2014, and interest, together with a declaratory judgment that the fees are unlawful. On 21 April 2017, Plaintiffs moved to certify a class of all undeveloped parcel owners who have paid the sewer service availability fees since 2009.

The parties filed cross-motions for summary judgment in October 2017. Plaintiffs moved for summary judgment on the issue of liability only, while Oak Island moved for summary judgment on all issues. A hearing on the parties' summary judgment motions was held on 16 April 2018. At the outset of the hearing, Plaintiffs voluntarily dismissed their claim for declaratory judgment without prejudice, leaving only their claim for the recovery of fees paid from 2010 to 2014. At the end of the hearing, Plaintiffs orally moved to amend the pleadings pursuant to Rule 15(b) of the North Carolina Rules of Civil Procedure, or alternatively, to supplement their complaint pursuant to Rule 15(d), in order to bring claims for recovery of sewer service availability fees paid in fiscal years 2015 through 2017. Oak Island objected to the motion.

Without ruling on Plaintiffs' motion to amend, the trial court denied Plaintiffs' motion for partial summary judgment and granted Oak Island's motion for summary judgment. In light of these rulings, the trial court

also did not rule upon Plaintiffs' motion for class certification. On 2 May 2018, the trial court entered an order memorializing its decision and taxing the costs against Plaintiffs. Plaintiffs filed notice of appeal to this Court on 21 May 2018.

On appeal, Plaintiffs contend that the trial court erred by granting Oak Island's motion for summary judgment because (1) the statutory phrase "availability of sewer service" precludes Oak Island from assessing sewer service availability fees against undeveloped properties; (2) Oak Island provided a full credit or rebate of the availability fees to owners of developed parcels, thereby violating Plaintiffs' constitutional rights and certain tax principles; and (3) refunds were provided to owners of developed parcels in violation of N.C. Gen. Stat. § 105-380(a). Finally, Plaintiffs argue that the trial court erred in failing to grant their motion to amend the pleadings.

II. Discussion

a. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). Our standard of review on appeal from an order granting summary judgment is *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

b. Statutory Authority to Assess Sewer Service Availability Fees

[1] We first address Plaintiffs' argument that the trial court erred in granting summary judgment in favor of Oak Island because Oak Island exceeded its statutory authority under the Session Laws by assessing the sewer service availability fees against Plaintiffs' undeveloped properties. Specifically, Plaintiffs argue that their undeveloped properties are not ones that "could or do[] benefit from the availability" of Oak Island's sewage treatment services. We agree, and therefore reverse the trial court's order granting summary judgment in favor of Oak Island on this ground.

"As creations of the legislature, municipalities have only those powers delegated to them by the General Assembly." *Quality Built Homes, Inc. v. Town of Carthage*, 369 N.C. 15, 16, 789 S.E.2d 454, 455 (2016). "The General Assembly delegates express power to municipalities by adopting an enabling statute, which includes implied powers essential to the exercise of those which are expressly conferred." *Id.* at 19,

789 S.E.2d at 457 (quotation marks and alteration omitted). Otherwise, "[a]ll acts beyond the scope of the powers granted to a municipality are invalid." *Id.*

"When determining the extent of legislative power conferred upon a municipality, the plain language of the enabling statute governs." *Id.* "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citation omitted).

In the instant case, although the Session Laws do not define the term "availability" for purposes of imposing the sewer service availability fees, it is clear that the enabling Session Laws do not, as a matter of law, apply to Plaintiffs' undeveloped property.

"In the event that the General Assembly uses an unambiguous word without providing an explicit statutory definition, that word will be accorded its plain meaning." *Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 19, 803 S.E.2d 142, 149 (2017). The plain meaning of the unambiguous, undefined word "availability" is "the quality or state of being available." *Availability*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/availability (last visited May 31, 2019). "Available" means "present or ready for immediate use." *Available*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/available (last visited May 31, 2019).

As noted in Oak Island's answer to Plaintiffs' first set of interrogatories, in order to "benefit from the availability" of Oak Island's sewer system, the owner of an undeveloped parcel of property would first be required to (1) obtain the requisite building permits; (2) construct a dwelling or building with a sewer system connection on the property; (3) have the improvements pass municipal inspection; (4) obtain a plumbing permit; (5) submit an application for service; and (6) meet any additional requirements governing the improvement of property set forth in the Town of Oak Island Code of Ordinances. Should the system have the capacity to add and serve the parcel, an owner of undeveloped property who wished to connect to the system would also have to pay the requisite fees to Oak Island in order to obtain the various permits. The complex, costly additional requirements—many of them conditional—that the owner of an undeveloped lot must fulfill in order to benefit from Oak Island's sewer services foreclose any conclusion that such services are "present or ready for immediate use" by those owners.

Our conclusion is supported by *Ricks v. Town of Selma*, 99 N.C. App. 82, 392 S.E.2d 437 (1990), *disc. review improvidently allowed*, 328 N.C. 567, 402 S.E.2d 400 (1991), in which this Court addressed the validity of an availability charge in the context of water and sewer treatment services. At issue in *Ricks* was the validity of the defendant Town of Selma's ordinance that set "rates for . . . sewer service available but not received[.]" 99 N.C. App. at 84, 392 S.E.2d at 438. The plaintiffs were the owners of a 41-unit mobile-home park located inside the Town's limits, which utilized its own private septic tanks instead of the Town's sewer system. *Id.* at 83, 392 S.E.2d at 438. The Town assessed availability charges against the plaintiffs, who contended that the Town had exceeded the scope of its statutory authority, in that the plaintiffs were not using the Town's services. *Id.* at 84, 392 S.E.2d at 438-39. We disagreed.

The authorizing statute in *Ricks* permitted the Town to enact an ordinance "establish[ing] rates for the use of or the services furnished by any public enterprise." *Id.* at 84-85, 392 S.E.2d at 439 (quotation marks omitted) (citing N.C. Gen. Stat. § 160A-314(a)). The question presented thus was "whether making sewer service available is 'furnishing a service' within the meaning of the statute." *Id.* at 85, 392 S.E.2d at 439. We held that the Town's ordinance was statutorily authorized as against the plaintiffs, concluding that "a city's power to set rates for services furnished by a sewer system includes the power to charge for services available but not received," where the property is developed, but the owner chooses not to connect. *Id.* at 86, 392 S.E.2d at 440.

While the term "available" was not explicitly defined in *Ricks* or the relevant statute, the facts that were held to evidence "availability of service" are clearly distinguishable from those of the case at bar. In *Ricks*, the Town had extended water and sewer service to the plaintiffs' mobile home park; the plaintiffs *chose* to "tap[] onto the municipal water service, but . . . never connected any of their 41 housing units to the . . . sewer system[,]" preferring instead to use their existing septic tanks. *Id.* at 83, 392 S.E.2d at 438. In other words, the Town's sewer services were *present and ready for immediate use* by the *Ricks* plaintiffs, who simply opted not to connect to the system. Moreover, unlike the undeveloped property in the present case, the plaintiffs' property in *Ricks* was already developed and generating sewage, and the Town had authorized the units' connection to the system.

Our holding finds further support in the circumstances under which property may be subject to an "availability charge" pursuant to N.C. Gen. Stat. § 160A-317, which governs a municipality's authority

to require property owners to connect to its sewer facilities and to charge for such connections. Specifically, the statute authorizes municipalities to "require an owner of *developed property on which there are situated one or more residential dwelling units or commercial establishments* . . . to connect the owner's premises with the [city's] . . . sewer line." N.C. Gen. Stat. § 160A-317(a) (emphasis added). Alternatively, municipalities may subject such owners to "a periodic availability charge" in lieu of connection. *Id.*

The Session Laws' language "could . . . benefit from the availability of sewage treatment" follows the same logic of section 160A-317. 2004 N.C. Sess. Laws 117, 117, ch. 96, § 4. The fact that it would be outside the scope of Oak Island's authority under N.C. Gen. Stat. § 160A-317 to charge Plaintiffs an "availability charge" for its sewer services suggests that those services are similarly not "available" to Plaintiffs for purposes of the Session Laws. *See, e.g.*, *In re Halifax Paper Co.*, 259 N.C. 589, 594, 131 S.E.2d 441, 445 (1963) ("[I]t is the duty of the courts to reconcile laws and adopt the construction of a statute which harmonizes it with other statutory provisions.").

Also instructive, though lacking precedential value, is *Holmes Harbor Sewer Dist. v. Holmes Harbor Home Bldg. LLC*, 123 P.3d 823 (Wash. 2005), in which the Washington Supreme Court directly addressed the meaning of "availability" of sewer services. 123 P.3d at 825-26. Similar to the statutory scheme at issue in this case, the Washington statute permitted the district to "fix[] rates and charges for furnishing sewer and drainage service and facilities to those to whom *service is available*." *Id.* at 824-25. The Washington Supreme Court held in favor of an owner of unimproved property who had refused to pay the availability charges. *Id.* at 827. Specifically, the Court concluded that "unimproved lots are not properties to which sewer service is available," and therefore, "the charges at issue [we]re not statutorily authorized."[4] *Id.* at 823.

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4. The dissent cites *Durango W. Metro. Dist. #1 v. HKS Joint Venture P'ship*, 793 P.2d 661 (1990), and *McMillan v. Texas Natural Res. Conservation Comm'n*, 983 S.W.2d 359 (1998), as instructive opinions from other jurisdictions, which stand for the contrary proposition. The holdings of those cases are misconstrued. The property owner in *Durango* had only argued (1) that the sewer district did not fall within the statutory definition of a "municipality," and thus lacked the authority to impose availability of service charges altogether, and (2) that the availability fees were subject to a statutory "fifty percent of . . . regular service charges" limitation. *Durango W. Metro. Dist. #1*, 793 P.2d at 663. The property owner did not argue that the district had exceeded its statutory authority by assessing availability fees against the plaintiff's vacant, unimproved property. In *McMillan*, the pertinent statute explicitly authorized the assessment of standby fees for available sewer services against "*undeveloped property*." *McMillan*, 983 S.W.2d at 361 (emphasis added).

As Oak Island did, the sewer district in *Holmes Harbor* initially charged a special assessment to all property owners of both improved and unimproved parcels and later imposed additional availability charges. The availability charges were assessed against unimproved properties, unconnected to the system and generating no sewage, as well as those developed, connected, and actually receiving services. Moreover, as here, owners of unimproved property had "no guaranteed right to connect to the sewer system." *Id.* at 824. Should there be sufficient capacity, the Washington sewer district reserved the right to authorize any new connections. However, "[b]efore authorizing connection, the [d]istrict [had to] approve the hookup application, and upon approval by the [d]istrict, property owners [then had to] pay for the installation of on-site facilities and connection to the sewer system." *Id.* at 827. Finding that the initial assessment had compensated the district for "the special benefit of potentially increased property values resulting from the construction of the sewer system," *id.* at 826 n.5, the Court concluded that justifying the availability charges would require more than a nebulous opportunity to connect to the system at some undetermined future date. *See id.* at 826-27. Accordingly, the Court held that sewer service was not available where "the properties at issue are not improved, are not connected to the sewer system, and have no guaranteed right to connect upon improvement." *Id.* at 827.

Similarly here, Plaintiffs' undeveloped properties are not ones that "*could or do[] benefit from the availability* of" Oak Island's sewer treatment services. 2004 N.C. Sess. Laws 117, 117, ch. 96, § 4 (emphasis added). The undeveloped properties are not connected to or being served by the municipal sewer service, and "have no guaranteed right to connect." *Holmes Harbor*, 123 P.3d at 827. Thus, the sewer service is not available to the owners of such properties. Consequently, beyond the initial assessment imposed, Oak Island's additional and ongoing charges to Plaintiffs, as owners of undeveloped properties, for sewer service availability was not a valid exercise of statutory authority pursuant to Session Law 2004-96.

In light of our decision, we do not address Plaintiffs' additional arguments concerning the tax credit provided to developed property owners and not to undeveloped property owners.

c. Motions to Amend Pleadings

[2] Finally, Plaintiffs argue that the trial court erred by failing to grant their oral motions to amend or supplement their complaint pursuant to Rule 15(b) and (d) of the North Carolina Rules of Civil Procedure.

However, because Plaintiffs failed to obtain rulings on these motions, there is no judicial action for this Court to review at this time.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely . . . motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1). "It is also necessary for the complaining party to obtain a ruling upon the party's . . . motion." *Id.*

At the outset of the hearing, Plaintiffs took a voluntary dismissal of their declaratory judgment claim. At that point, Defendant noted that "[s]ince the damages requested are only from 2010 to 2014, now there's no request for beyond 2015." At the end of the hearing, Plaintiffs moved to amend their complaint, pursuant to Rule 15(b), to include damages for sewer service availability fees paid during fiscal years 2015 through 2017. Plaintiffs argued that damages for these years had been tried by consent because Oak Island's Exhibit D included sewer service availability fees charged to landowners for fiscal years 2010 through 2017. In the alternative, Plaintiffs argued that they should be allowed to supplement their complaint pursuant to Rule 15(d). Oak Island objected to Plaintiffs' motion to amend their complaint, arguing that it did not try the issue of damages in those years by consent.[5]

After the hearing, the trial court announced its decision to deny Plaintiffs' motion for partial summary judgment and grant Oak Island's motion for summary judgment. However, the trial court did not decide or rule upon Plaintiffs' Rule 15 motions. Because Plaintiffs did not obtain rulings upon their Rule 15 motions, they failed to preserve for appeal any arguments concerning the same. *See id.*; *Gilreath v. N.C. Dep't of Health & Human Servs.*, 177 N.C. App. 499, 501, 629 S.E.2d 293, 294 (holding that the plaintiff's argument that the trial court erred in failing to grant the plaintiff's motion to strike paragraphs from affidavits was unpreserved because the plaintiff did not obtain a ruling on that motion), *aff'd per curiam*, 361 N.C. 109, 637 S.E.2d 537 (2006). These arguments are not before us at this time.

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5. Oak Island reminded the trial court that when Plaintiffs dismissed their declaratory judgment action, Oak Island had notified the court that damages for fiscal years 2015 through 2017 were no longer applicable. Oak Island also explained that Exhibit D was prepared in response to Plaintiffs' request for declaratory judgment, but, that it probably would not have submitted this exhibit had it known that Plaintiffs were going to dismiss their declaratory judgment claim.

III. Conclusion

The trial court's order granting summary judgment in favor of Oak Island is reversed and remanded.

REVERSED AND REMANDED.

Judge TYSON concurs.

Judge COLLINS concurs in part and dissents in part by separate opinion.

COLLINS, Judge, concurs in parts and dissents in part.

Plaintiffs, owners of undeveloped parcels of property in the Town of Oak Island, challenge fees levied upon them by Defendant Town of Oak Island for payment of sewer system debt service, pursuant to a 1996 session law. Plaintiffs argue the fees are unauthorized by statute, unconstitutional, and violative of certain tax principles, and seek declaratory judgment and recovery of the fees. Because I conclude Plaintiffs' arguments lack merit, I would affirm the trial court's order granting summary judgment in favor of Defendant Town of Oak Island. I therefore respectfully dissent. However, I concur with the majority that Plaintiffs failed to preserve for our appellate review any issue regarding their oral motions to amend or supplement their complaint.

I. Procedural History

By Complaint filed 11 December 2015 and Amended Complaint filed 15 January 2016 (collectively Complaint), Plaintiffs, owners of undeveloped parcels of property in the Defendant Town of Oak Island (Town or Oak Island), challenged sewer district fees (Fee or Fees) Oak Island was collecting to pay debt service on its sewer system. Plaintiffs sought to recover Fees paid from 2010 to 2014, and declaratory judgment that the Fees are unlawful. Oak Island answered the Complaint, denied its material allegations, and moved to dismiss the Complaint. On 21 April 2017, Plaintiffs moved to certify a class of all undeveloped parcel owners who have paid Fees since 2009.

In October 2017, the parties filed cross-motions for summary judgment. Plaintiffs moved for summary judgment on the issues of liability only while Oak Island moved for summary judgment on all issues.

A hearing on the parties' summary judgment motions was held on 16 April 2018. At the outset of the hearing, Plaintiffs took a voluntary

dismissal without prejudice of their prayer for declaratory judgment, leaving only their claim for the recovery of Fees paid from 2010 to 2014.

At the end of the hearing, Plaintiffs orally moved to amend the pleadings under North Carolina Rules of Civil Procedure 15(b) and to supplement the complaint under N.C. R. Civ. P. 15(d) to bring claims for recovery of Fees paid in 2015, 2016, and 2017. Oak Island objected to the motion. Without ruling on Plaintiffs' motion to amend the pleadings, the trial court denied Plaintiffs' motion for partial summary judgment and granted Oak Island's motion for summary judgment. In light of these rulings, the trial court did not consider Plaintiffs' class certification motion. On 2 May 2018, the trial court entered an Order reflecting its ruling and taxing costs against Plaintiffs. Plaintiffs filed Notice of Appeal to this Court on 21 May 2018.

II. Factual Background

Oak Island constructed a sewer system at a cost of $140 million. As of October 2017, the principal amount of indebtedness for the system was approximately $117 million. Sewer lines run in front of each parcel of property on Oak Island, both developed and undeveloped, and the sewer system has the capacity and ability to serve all parcels of property on Oak Island.

Starting in 2004, the General Assembly adopted legislation to assist Oak Island and two other towns in amortizing their sewer system debt. Specifically, the General Assembly enacted three Session Laws authorizing the towns to create fee-supported sewer treatment districts and impose sewer district fees to pay the debt service on their sewer systems. A 2004 session law applied to Holden Beach. *See* 2004 N.C. Sess. Law 96 (2004). A 2006 session law added Oak Island to the sewer district fee authority previously granted to Holden Beach. *See* 2006 N.C. Sess. Law 54 (2006). A 2010 session law broadened the authority granted to include Caswell Beach. *See* 2010 N.C. Sess. Law 29 (2010).

The relevant portions of the 2006 session law applicable to Oak Island (Session Law) provide:

> SECTION 1. Fee-Supported District. – A municipality may create a fee-supported sewer treatment district for all properties that are or can be served by the sewage collection and treatment plant serving properties within the Town.
>
> . . . .

> SECTION 3. Imposition of Annual Fees. – The Town may impose annual fees for the availability of sewer service within the district. The Board shall set same on or before July 1 each year.
>
> SECTION 4. Fees. – The fees imposed by the municipality may not exceed the cost of providing the sewer collection facility within the municipality and the cost of the contract with a county to provide it with the facilities to transport, treat, and dispose of the municipality's effluent. Said fees shall be imposed on owners of each dwelling unit or parcel of property that could or does benefit from the availability of sewage treatment.
>
> SECTION 5. Billing of Fees. – The municipality may include a fee imposed under this section on the property tax bill for each parcel of property lying within the municipal limits on which the fee is imposed. Said fee shall be collected in the same manner as provided for in the General Statutes for the collection of ad valorem taxes, and remedies available by statute for the collection of taxes shall apply to the collection of the sewer district fees.
>
> SECTION 6. Use of Fees. – The Town shall credit the fees collected within the district to a separate fund to be used only to pay the debt service for the sewer system. . . .

S.L. 2006-54 (amending S.L. 2004-96).[1]

Debt service on Oak Island's sewer system is paid from (1) assessments paid by all parcel owners, (2) monthly fees paid by developed parcel owners currently using the system, and (3) yearly fees paid by undeveloped parcel owners. Starting in fiscal year 2009,[2] owners of developed parcels began paying debt service fees via a monthly charge for basic sewer service, covering debt service and operating costs, along with a usage charge for service over 4,000 gallons per month. In fiscal year 2010, owners of undeveloped parcels began paying sewer district Fees once a year, with the Fee appearing on their yearly property tax bill.

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1. The relevant text of S.L. 2006-54 appears in the body of S.L. 2004-96. The text of S.L. 2006-54 indicates that Section 8 of S.L. 2004-96 reads as rewritten: "SECTION 8. This act applies only within the ~~Town of Holden Beach~~ Towns of Holden Beach and Oak Island."

2. "Fiscal year 2009" means the time period of 1 July 2008 through 30 June 2009. Other fiscal year references are computed the same way.

Even though owners of developed parcels pay debt service fees on a monthly basis, a yearly sewer district Fee also appears on their annual property tax bill. This Fee is credited back on the same annual property tax bill such that owners of developed parcels are not double-billed for debt service payments. By collecting debt service fees from developed parcel owners monthly, Oak Island pays down the sewer system debt faster than if it collected the sewer district Fees on a yearly basis.

The debt service payments paid by each type of parcel during the years at issue[3] are as follows:

Fiscal Year	Developed	Undeveloped
2010	$733.26	$146.15
2011	$435.46	$146.15
2012	$324.63	$139.13
2013	$490.81	$576.00
2014	$657.61	$643.68

III. Issues

On appeal, Plaintiffs assert the trial court erred by (1) failing to grant Plaintiffs' motion to amend their Complaint; (2) failing to grant Plaintiffs' motion to supplement their Complaint; (3) granting Defendant's motion for summary judgment because the term "availability of sewer service" in the Session Law cannot be harmonized with N.C. Gen. Stat. § 160A-317(a); (4) granting Defendant's motion for summary judgment because Defendant provided a full credit or rebate of the sewer district fee to owners of developed parcels, thereby violating Plaintiffs' constitutional rights and certain tax principles; and (5) granting Defendant's motion for summary judgment because refunds were provided to owners of developed parcels in violation of N.C. Gen. Stat. § 105-380(a).

IV. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

3. Plaintiffs failed to obtain rulings on their oral motions to amend their complaint under Rule 15(b) or supplement their complaint under Rule 15(d) of the Rules of Civil Procedure to bring claims for recovery of Fees paid in 2015, 2016, and 2017. Accordingly, these arguments are not preserved for our appellate review. *See* Section V.A. Therefore, the only issue before this court is Plaintiffs' complaint for recovery of Fees paid during the years 2010-14.

any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2018). Our standard of review of an appeal from an order granting summary judgment is *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Moreover, appellate review of constitutional challenges is *de novo*. *See generally Hart v. State*, 368 N.C. 122, 130, 774 S.E.2d 281, 287 (2015).

V. Discussion

A. Motions to Amend or Supplement Complaint

Because Plaintiffs failed to obtain rulings on their oral motions to amend their complaint under Rule 15(b) or supplement their complaint under Rule 15(d) of the Rules of Civil Procedure to bring claims for recovery of Fees paid in 2015, 2016, and 2017, I agree with the majority that these arguments are not preserved for our appellate review. *See* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review . . . [i]t is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion."); *Gilreath v. N.C. Dep't of Health & Human Servs.*, 177 N.C. App. 499, 501, 629 S.E.2d 293, 294 (2006) (holding plaintiff failed to preserve an argument that the trial court erred in failing to grant plaintiff's motion to strike paragraphs from affidavits because plaintiff failed to obtain a ruling on the motion).

Therefore, the only issue before this court is Plaintiffs' complaint for recovery of Fees paid during the years 2010-14.

B. Statutory Authority to Assess Sewer District Fees

Plaintiffs advance several arguments as to why Oak Island lacked the statutory authority to impose the Fees upon owners of undeveloped parcels. I address and reject each argument.

Meaning of the term "availability of service"

The Session Law authorizes Oak Island to "create a fee-supported sewer treatment district for all properties that are or can be served by the sewage collection and treatment plant serving properties within the Town." S.L. 2006-54 § 1. Annual fees may be imposed "for the availability of sewer service within the district." S.L. 2006-54 § 3. "Said fees shall be imposed on owners of each dwelling unit or parcel of property that could or does benefit from the availability of sewage treatment." S.L. 2006-54 § 4. Plaintiffs argue that the term "availability of sewer service" does not relate to owners whose parcels are undeveloped in that "service is not available" to them because they must take additional steps to connect to the sewer system. Plaintiffs misconstrue the plain language of the Session Law.

"The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990) (citation omitted). "The best indicia of that intent are the language of the statute . . . , the spirit of the act[,] and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted). Thus, "[i]n resolving issues of statutory construction, we look first to the language of the statute itself." *Walker v. Bd. of Tr. of the N.C. Local Gov't. Emp. Ret. Sys.*, 348 N.C. 63, 65, 499 S.E.2d 429, 430 (1998) (quotation marks and citation omitted). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citation omitted).

While the Session Law does not define the term "availability," the ordinary meaning of "availability" is the state of being "present or ready for immediate use[.]" *Availability*, *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/availability (last visited April 16, 2019); *see Fid. Bank v. N.C. Dep't of Revenue*, 370 N.C. 10, 19, 803 S.E.2d 142, 149 (2017) ("In the event that the General Assembly uses an unambiguous word without providing an explicit statutory definition, that word will be accorded its plain meaning."). The Session Law authorizes the imposition of fees "for the availability of sewer service *within the district*." S.L. 2006-54 § 3 (emphasis added). The district is comprised of "all properties that *are or can be served* by the sewage collection and treatment plant serving properties within the Town." S.L. 2006-54 § 1 (emphasis added). Thus, the Session Law authorizes Oak Island to impose fees for the sewer service's presence or readiness for use by all properties that are or can be served by the Town's sewage collection and treatment plant.

Oak Island's Chief Financial Officer, David Hatten, stated in his uncontradicted affidavit that Oak Island installed a sewer system and that "[s]ewer lines run in front of each parcel on Oak Island, both developed and undeveloped. Oak Island's sewer system has the capacity and ability to serve all parcels both developed and undeveloped." These undisputed averments compel the conclusion that the sewer service is present or ready for immediate use by all properties that are or can be served by the Town's sewage collection and treatment plant, including undeveloped parcels of property. Plaintiffs' parcels, while not presently served by the Town's sewage collection and treatment plant, "can be

served" by the Town's sewage collection and treatment plant when they are connected to the sewer lines in the future.

Moreover, the Session Law contemplates the levying of fees upon owners of undeveloped parcels of property that indirectly benefit from the sewer system but are not currently connected to the system, and that could directly benefit from the system upon connection. Furthermore, as explained at oral argument, parcels which can never be developed — and thus can never be served by the sewage collection and treatment plant — can be exempted from paying Fees.

Plaintiffs propose construing the statute to require that a parcel be developed and presently able to connect to the sewer system before Fees can be imposed. Plaintiffs' interpretation would require terms be added to the Session Law, while rendering the terms "can be served [,]" "within the district[,]" and "parcel of property that could . . . benefit" superfluous. Such statutory construction is not permitted, because "[i]n effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used." *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (internal citations and quotation marks omitted). We construe each word of a statute to have meaning, where reasonable and consistent with the entire statute, because "it is always presumed that the legislature acted with care and deliberation . . . ." *Batts v. Batts*, 160 N.C. App. 554, 557, 586 S.E.2d 550, 553 (2003) (quotation marks and citation omitted).

As the plain language of the Session Law authorizes Oak Island to impose Fees upon all owners of developed and undeveloped parcels of property within the Town of Oak Island's fee-supported sewer district as a result of sewer service being available within the district, Oak Island was authorized to impose Fees upon Plaintiffs.

This conclusion comports with *Ricks v. Town of Selma*, 99 N.C. App. 82, 392 S.E.2d 437 (1990), wherein this Court concluded that a town could "set an availability charge for water or sewer service available but not received." *Id.* at 84, 392 S.E.2d at 438-39. The town had the statutory authority to establish rates " 'for the use of or the services furnished by any public enterprise.' " *Id.* at 84-85, 392 S.E.2d at 439 (quoting N.C. Gen. Stat. § 160A-311(2)). " 'Public enterprise' " included " '[s]ewage collection.' " *Id.* (quoting N.C. Gen. Stat. § 160A-311(3)). The question was "whether making sewer service available is 'furnishing a service' within the meaning of the statute[.]" *Ricks*, 99 N.C. at 85, 392 S.E.2d at 439.

The town had extended water and sewer service to plaintiffs' property and, thus, "[b]oth water and sewer service from the Town of Selma were available to plaintiffs' property." *Id.* at 83, 392 S.E.2d at 438. Plaintiffs did not tap into the municipal sewer system, choosing instead to continue to use their private septic tank. This Court concluded that by making sewer service available, i.e., extending the sewer service to the property, the city had furnished a service, thus authorizing it to set a rate for this service. *Id.* at 85, 392 S.E.2d at 439.

Just as the Town of Selma extended sewer service to plaintiffs' property in *Ricks*, Oak Island has extended sewer service to all parcels on Oak Island, including Plaintiffs' properties. Thus, as in *Ricks*, sewer service was available to all parcels in Oak Island, including Plaintiffs' parcels. Moreover, unlike in *Ricks* where the Court was interpreting the scope of the rate-setting authority of a broadly applicable statute, in this case, the narrowly applicable Session Law specifically granted Oak Island the authority to impose Fees upon Plaintiffs' as owners of parcels of property that can be served by the Town's sewage collection and treatment plant and that could benefit from the availability of sewage treatment. S.L. 2006-54 §§ 1, 4.

Plaintiffs rely heavily upon *Holmes Harbor Sewer Dist. v. Holmes Harbor Home Bldg. LLC*, 123 P.3d 823 (Wash. 2005), wherein the court concluded that a statute authorizing water-sewer districts to charge rates for sewer service and facilities did not allow a district to assess monthly fees on undeveloped properties. *Id.* at 827. Such reliance is misplaced.

The statute at issue allowed a district to " 'fix[] rates and charges for furnishing sewer and drainage service and facilities to those *to whom* service is available . . . .' " *Id.* at 824-25 (quoting RCW 57.08.081(1)) (emphasis added). The court concluded that the text of the statute required "districts to furnish some level of sewer and drainage service" to an individual in order to impose rates and charges. *Holmes*, 123 P.3d at 825. The court then analyzed the statutory framework governing the general powers of water-sewer districts as well as the district's resolution governing the use of the system which provided, "Nothing in this Resolution is intended, nor shall it be construed, to grant to any person or entity any right to connect to the Public Sewer System" to determine to whom service was available. *Id.* at 824.

In holding that RCW 57.08.081(1) did not give the district the authority to assess monthly fees against undeveloped properties, the court reasoned,

> [t]hough the legislature may not have intended that a physical connection be made for sewer service to be available, the language of RCW 57.08.081(1) requires that some level of service be furnished. The statutory framework governing water-sewer districts also requires more than an uncertain opportunity for an unimproved property to connect to the system, especially in this case where under the resolution the property owners have no right or duty to connect.

Id. at 826.

Holmes Harbor is not binding on this Court and is nonetheless distinguishable from the present case. Unlike the plain language of the statute in *Holmes Harbor*, which only authorized charges to be assessed against individuals to whom sewer service was being furnished, the plain language of the Session Law in this case authorizes Fees to be imposed for the general availability of sewer service within the district, and specifically authorizes the district to include parcels of property that are not presently served by the Town's sewage collection and treatment plant, but could be.

Moreover, while the State of Washington's statutory framework informed the court's interpretation of "*to whom* service is available" and, thus, when an individual could be charged for sewer service, this Court need not engage in statutory interpretation of the Session Law's language, as it plainly authorizes Oak Island to impose Fees upon all owners of developed and undeveloped parcels of property within the Town's fee-supported sewer district as a result of sewer service being available within the district. *See Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) ("If the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms.").

Furthermore, while opinions from other jurisdictions interpreting forms of the word "available" in light of their own statutory schemes and case law may be instructive, *see*, *i.e.*, *Durango W. Metro D. No. 1 v. HKS Joint Venture P'ship*, 793 P.2d 661 (Colo. App. 1990) (concluding the district could charge an availability of service fee for water and sewer services to vacant unimproved lots within the district); *McMillan v. Texas Nat. Res. Conservation Comm'n*, 983 S.W.2d 359 (Tex. App. 1998) (holding standby fees for available water and sewer services could be charged even though lots were not connected to the water and sewer mains), they are not necessarily persuasive, as is the case with *Holmes*

Harbor, and they are not binding on this Court. What is binding on this Court is the plain meaning of the Session Law, in keeping with North Carolina case law, which compels a conclusion that Oak Island was authorized to collect Fees from Plaintiffs.

Harmony with N.C. Gen. Stat. § 160A-317(a)

Plaintiffs next argue that the Session Law's term "availability of sewer service" is not in harmony with the terms of N.C. Gen. Stat. § 160A-317(a), which governs the power of a city to require connections to water or sewer service. Plaintiffs assert that because § 160A-317(a) only requires an owner of developed property to connect the owner's premises to a sewer line, or pay a fee in lieu thereof, the Session Law may only require an owner of a developed property to pay a sewer debt fee. Plaintiffs' argument lacks merit.

When statutes "deal with the same subject matter, they must be construed *in pari materia*, and harmonized to give effect to each." *Gravel Co. v. Taylor*, 269 N.C. 617, 620, 153 S.E.2d 19, 21 (1967). "When, however, the section dealing with a specific matter is clear and understandable on its face, it requires no construction." *State ex rel. Utilities Comm'n. v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) (citations omitted).

Even assuming, for this discussion's sake, the Session Law and N.C. Gen. Stat. § 160A-317(a) deal with the same general subject matter – the regulation of town sewer systems – each law addresses a different, specific matter regarding such regulation, and each law is clear and understandable on its face. Thus, no construction is needed to give effect to each.

The Session Law addresses Oak Island's authority to charge land owners Fees to pay for sewer debt service. The law specifically allows the creation of a fee-supported, as opposed to use-supported, sewer treatment district for "all properties that are or can be served by the sewage collection and treatment plant" and to "impose annual fees for the availability of sewer service" upon "owners of each dwelling unit or parcel of property that could or does benefit from the availability of sewage treatment." S.L. 2006-54 §§ 1, 3, 4.

N.C. Gen. Stat. § 160A-317 addresses a city's authority to require connections to water or sewer service and charge for such connections. The law specifically allows a city to require "an owner of developed property on which there are situated one or more residential dwelling units or commercial establishments . . . to connect the owner's premises

with the water or sewer line or both, and may fix charges for the connections." N.C. Gen. Stat. § 160A-317(a). The statute further allows the city to "require payment of a periodic availability charge" in lieu of requiring connection. *Id.*

While N.C. Gen. Stat. § 160A-317 applies only to "an owner of developed property on which there are situated one or more residential dwelling units or commercial establishments[,]" the Session Law lacks such limiting language, and explicitly applies to "all properties that are or can be served by the sewage collection and treatment plant" and to "owners of each dwelling unit or parcel of property that could or does benefit from the availability of sewage treatment." S.L. 2006-54 §§ 1, 4.

Had the legislature intended for the Session Law to impose annual fees for the availability of sewer service within the district only upon owners of developed property, the legislature could have mirrored the language in N.C. Gen. Stat. § 160A-317(a) when drafting the Session Law, making it applicable only to "an owner of developed property on which there are situated one or more residential dwelling units or commercial establishments . . . ." N.C. Gen. Stat. § 160A-317(a). But the legislature did not do so, and we will not read language into the Session Law that is not reflected therein. *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) (We "presum[e] that the legislature carefully chose each word used.") (citation omitted).

I thus conclude that the Session Law granted Oak Island the statutory authority to impose the Fees upon owners of undeveloped parcels.

C. No "Full Credit or Rebate" of Fees

Plaintiffs next argue "it was error to grant Defendant's motion for summary judgment for the reason that Defendant provided a full credit or rebate of the sewer district fee to taxpayers on developed lots" thereby: (1) denying Plaintiffs the equal protection of the law, (2) taking Plaintiffs' private property for public use without just compensation, (3) violating the requirement for just and equitable taxation, (4) violating the requirement for exclusive public purpose of taxes, and (5) violating the principle of uniformity of taxation. I address each argument in turn.

Equal Protection

Plaintiffs argue they were denied equal protection of the law "because [D]efendant provided a full credit or rebate of the sewer district fee to taxpayers on developed lots[.]" Plaintiffs more specifically argue, "[t]here could be no reasonable basis for the classifications of improved and unimproved properties, and for the consequently differential

treatment of them, the unimproved properties being required to pay, and the improved properties being totally subject to refund."[4]

But, as Plaintiffs conceded at oral argument and this opinion details above, Defendant did not provide a full credit or rebate of the Fees to owners of developed lots. Owners of developed parcels paid sewer debt service fees on a monthly basis throughout the year, but were also charged the yearly Fee on their year-end tax bill. Those owners received a credit in the amount of the Fee on their year-end tax bill to avoid double-billing them for sewer debt service payments.

Plaintiffs' equal protection argument thus fails.

Taking Without Just Compensation

Plaintiffs next argue that the Fee imposed on undeveloped property owners is a taking of private property for public use without just compensation, in violation of Article I, Section 19 of the North Carolina Constitution. Plaintiffs argue that "[t]o lay a burden on one group of taxpayers for the benefit solely of another group of taxpayers, is a clear violation of the principle prohibiting taking of private property for public use without just compensation, and is contrary to Section 19."

Plaintiffs' argument again fails because, as described above, owners of developed parcels were not given full refunds of the Fees. To the extent Plaintiffs are arguing that *any* Fees imposed on the undeveloped property owners are takings, irrespective of the Fees imposed on developed property owners, this argument too fails.

The Federal Takings of the Fifth Amendment of the United States Constitution forbids the taking of private property by the government without just compensation. *Sullivan v. Pender Cty.*, 196 N.C. App. 726, 731, 676 S.E.2d 69, 73 (2009) (quotation marks and citations omitted). "[A]lthough the North Carolina Constitution does not contain an express provision prohibiting the taking of private property for public use without payment of just compensation, this Court has inferred such a provision as a fundamental right integral to the 'law of the land' clause in article I, section 19 of our Constitution." *Finch v. City of Durham*, 325 N.C. 352, 362-63, 384 S.E.2d 8, 14 (1989) (citations omitted).

"[A] reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services." *United States v. Sperry*

4. Plaintiffs make no equal protection argument based on any difference in the amount of sewer debt service fees charged to the developed and undeveloped parcel owners or the methods used to collect the fees. Those arguments are thus not before us.

Corp., 493 U.S. 52, 63 (1989). Moreover, a user fee need not "be precisely calibrated to the use that a party makes of Government services. . . . All that we have required is that the user fee be a fair approximation of the cost of benefits supplied." *Id.* at 60 (internal quotation marks and citation omitted); *see Massachusetts v. United States*, 435 U.S. 444, 468 (1978) (holding that a federal fee imposed on civil aircraft was a fair approximation of the cost of the benefits supplied where "[e]very aircraft that flies in the navigable airspace of the United States has available to it the navigational assistance and other special services supplied by the United States . . . [a]nd even those aircraft, if there are any, that have never received specific services from the National Government benefit from them in the sense that the services are available for their use if needed and in that the provision of the services makes the airways safer for all users").

The Fee in this case is not a taking because it is a "reasonable user fee" "imposed for the reimbursement of the cost of government services" and is a fair approximation of the cost of benefits supplied. *Sperry*, 493 U.S. at 63. The Session Law specifies that the Fees "may not exceed the cost of providing the sewer collection facility within the municipality and the cost of the contract with a county to provide it with the facilities to transport, treat, and dispose of the municipality's effluent." S.L. 2006-54 § 4. Furthermore, the Session Law requires Oak Island to "credit the fees collected within the District to a separate fund to be used only to pay the debt service of the sewer system." *Id.* at § 6. The Session Law is clear, and Plaintiffs make no argument to the contrary, that the fees are being "imposed for the reimbursement of the cost of government services." *Sperry*, 493 U.S. at 63.

Moreover, Plaintiffs are directly and indirectly benefited by Oak Island's comprehensive sewer system. Sewer lines are present in front of each parcel of property and are ready for immediate use when Plaintiffs choose to connect to the system. Furthermore, Plaintiffs benefit now and in the future from the installation and maintenance of Oak Island's comprehensive sewer system which helps prevent and eliminate hazardous pollution. As our Supreme Court explained in *Drysdale v. Prudden*, 195 N.C. 722, 143 S.E. 530 (1928),

> It is a matter of common knowledge that odor from human excrement in a fairly thickly settled community will affect all around, the shifting wind makes it offensive in the entire district. The water and sewer eliminates this condition not only the annoyance, but the danger that comes from the fly feeding on filth and carrying the germ and thus pollute and

> poison food and drink. A water and sewer system eliminates the breeding places. It is a well known medical fact that filth breeds typhoid fever and the fly carries the germ. *See Storm v. Wrightsville Beach*, [189 N.C. 679, 128 S.E. 17 (1925)]. . . . Water, sewer, drainage and screening have been of untold value to the human family.

Id. at 731, 143 S.E. at 534-35; *see also Board of Water & Sewer Comm'rs of the City of Mobile v. Yarbrough*, 662 So.2d 251, 254 (Ala. 1995) ("The citizens . . . are directly or indirectly affected by the results of the pollution of [public] waters and the beneficial results to be obtained by the elimination of the pollution will be a public benefit to the entire community and citizens thereof.").

Because the Fees are user fees for benefits Plaintiffs received, Plaintiffs' takings argument also fails.

Tax-based Arguments

Plaintiffs next argue that the Fee is actually a "true tax and subject to all of the principles to taxation." Based on this premise, Plaintiffs argue that the Fee violates Article V, Sections 2(1) and 2(2) of the North Carolina Constitution, which relate to the power of taxation, and N.C. Gen. Stat. § l05-380(a), which relates to tax refunds.

Our Supreme Court has recognized that a local assessment for public improvements is not a tax, as taxes are levied for purposes of general revenue. *S. Ry. Co. v. City of Raleigh*, 9 N.C. App. 305, 176 S.E.2d 21 (1970).

> "[L]ocal assessments . . . are not taxes within the meaning of that term as generally understood in constitutional restrictions and exemptions. They are not levied and collected as a contribution to the maintenance of the general government, but are made a charge upon property on which are conferred benefits entirely different from those received by the general public. They are not imposed upon the citizens in common at regularly recurring periods for the purpose of providing a continuous revenue, but upon a limited class in return for a special benefit. These assessments, it has been suggested, proceed upon the theory that when a local improvement enhances the value of neighboring property, it is reasonable and competent for the Legislature to provide that such property shall pay for the improvement."

Id. at 309, 176 S.E.2d at 23 (quoting *Tarboro v. Forbes*, 185 N.C. 59, 61, 116 S.E. 81, 82 (1923); *see also Kenilworth v. Hyder*, 197 N.C. 85, 90, 147 S.E. 736, 738 (1929) ("Provisions relating to taxation generally are uniformly held not applicable to local assessments or special taxation for improvements.").

Here, the Session Law creates a fee-supported sewer district for Oak Island. The Fees are specifically allocated to pay down the debt on Oak Island's sewer system, which provides a purely local improvement to the residents of Oak Island and helps a limited class of citizens by providing them with benefits different from those of the general public. Because those living in Oak Island receive a special, distinct benefit in exchange for paying the Fees, the Fees are not being collected for general revenue purposes. Accordingly, the Fees are not taxes in the meaning of the North Carolina Constitution.

Because the Fees are not taxes, Plaintiffs' tax-based arguments also fail.

Conclusion

I conclude there is no merit to Plaintiffs' arguments that the Fees are unauthorized by statute, unconstitutional, and violative of certain tax principles. As I conclude there is no genuine issue as to any material fact and Oak Island is entitled to judgment as a matter of law, I would affirm the trial court's order granting summary judgment in favor of Oak Island.

MUSSELWHITE v. CHESHIRE

[266 N.C. App. 166 (2019)]

MICHAEL MUSSELWHITE, PLAINTIFF
v.
L. BRIAN CHESHIRE, DEFENDANT

No. COA18-1083

Filed 2 July 2019

1. Appeal and Error—abandonment of issues—challenged findings of fact—sufficiency of evidence

In an appeal from an order involuntarily dismissing plaintiff's claims against his former business partner, where plaintiff's brief challenged nineteen findings of fact in the order but raised arguments regarding only two of those findings, any arguments against the other seventeen findings were deemed abandoned under Appellate Rule 28(b)(6). Additionally, the two findings that plaintiff did address did not justify reversal where one was immaterial to the issues on appeal and the other was supported by competent evidence.

2. Fraud—claims against former co-franchisee—inducement to execute buyout of corporate interests—involuntary dismissal

In a lawsuit between former co-franchisees who owned and operated restaurant franchises through two limited liability corporations (LLCs), the trial court properly dismissed plaintiff's fraud claims with prejudice pursuant to Civil Procedure Rule 41(b). Plaintiff alleged that defendant fraudulently induced him to execute an agreement—in which plaintiff sold back his interests in the LLCs—by telling him that the restaurant chain required plaintiff to divest his LLC interests, but plaintiff's only evidence to support this allegation was his own uncorroborated testimony. Additionally, defendant's other alleged misrepresentations to plaintiff—that the parties "just had to get some agreement on paper" to appease the restaurant chain and that "everything would be okay" if they did so—were not actionable as fraud.

3. Contracts—claims against former co-franchisee—unilateral mistake—mutual mistake—agreement divesting corporate interests—involuntary dismissal

In a dispute between former co-franchisees for a restaurant chain, the trial court—pursuant to Civil Procedure Rule 41(b)—properly dismissed plaintiff's action seeking to set aside an agreement in which plaintiff sold back his interests in the parties' two

limited liability corporations (LLCs). Plaintiff did not show a right to relief based on unilateral mistake because he failed to show that defendant defrauded him or subjected him to imposition, undue influence, or other oppressive circumstances when the parties executed the agreement. Also, plaintiff did not show a right to relief based on mutual mistake where defendant denied operating on a mistaken belief (namely, that the restaurant chain required plaintiff to divest his LLC interests) when executing the agreement.

4. Fiduciary Relationship—co-members of limited liability corporation—breach of fiduciary duty—not actionable

In an action between former co-members of two limited liability corporations, plaintiff's claim for breach of a fiduciary duty was properly dismissed with prejudice pursuant to Civil Procedure Rule 41(b), because members of a North Carolina limited liability corporation do not owe fiduciary duties to each other.

5. Contracts—express contract—unjust enrichment claim—not actionable

In a dispute between former co-franchisees for a restaurant chain, where plaintiff executed an express contract agreeing to divest himself of his interests in the parties' two limited liability corporations (LLCs) in exchange for financial benefits, the trial court properly dismissed plaintiff's unjust enrichment claim pursuant to Civil Procedure Rule 41(b).

6. Contracts—breach—implied covenant of good faith and fair dealing—involuntary dismissal—proper

In a dispute between former co-franchisees for a restaurant chain, where plaintiff executed a contract agreeing to divest himself of his interests in the parties' two limited liability corporations in exchange for various financial benefits, the trial court properly dismissed—pursuant to Civil Procedure Rule 41(b)—plaintiff's claim for breach of the implied covenant of good faith and fair dealing. The record showed that plaintiff received the benefits he bargained for under the contract.

7. Contracts—former business partners—agreement divesting corporate interests—unconscionability—involuntary dismissal—proper

In a dispute between former business partners, where plaintiff executed a contract agreeing to divest himself of his interests in the parties' two limited liability corporations (LLCs), the trial court

properly dismissed—pursuant to Civil Procedure Rule 41(b)—plaintiff's claim alleging unconscionability. The record showed that the parties negotiated the contract upon the same information and on equal terms, plaintiff understood what he was signing, and plaintiff received hefty financial benefits in exchange for his LLC interests.

8. Trusts—constructive—dispute between former business partners—involuntary dismissal—proper

In a dispute between former co-franchisees for a restaurant chain, plaintiff's cause of action for a constructive trust was properly dismissed pursuant to Civil Procedure Rule 41(b) where the trial court properly determined that defendant neither defrauded plaintiff nor breached a fiduciary duty owed to plaintiff.

Appeal by Plaintiff from order entered 14 February 2018 by Judge R. Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 10 April 2019.

The Lea/Schultz Law Firm, P.C., by James W. Lea, III, for Plaintiff-Appellant.

Shipman & Wright, LLP, by James T. Moore, for Defendant-Appellee.

COLLINS, Judge.

Plaintiff appeals from an order dismissing his claims with prejudice pursuant to North Carolina Rule of Civil Procedure 41(b). Plaintiff contends that the trial court erred by making unsupported findings of fact and erroneous conclusions of law in determining that Plaintiff had not shown a right to relief on his various causes of action. We affirm.

I. Background

Plaintiff worked in the foodservice industry from the 1970s until 2015, when the transaction at issue in this case took place. From 1994 to 2015, Plaintiff worked at and managed a number of restaurants affiliated with Smithfield's Chicken 'N Bar-B-Q ("Smithfield's"), a restaurant chain owned by Mid-Atlantic Restaurant Corporation ("MARC") and managed by Smithfield Management Corporation ("SMC") and, later, Cary Keisler, Inc.

Plaintiff and Defendant have had a personal and professional relationship that began when they met while working together in the mid-1970s. In the late 1990s, Plaintiff approached Defendant about

partnering to purchase and thereafter operate a Smithfield's franchise in Ogden. Defendant agreed, and the parties created two entities to own (Flamingo Properties, LLC) and operate (Whiteshire Foods, Inc.) the restaurant. Flamingo Properties purchased the real property, and Whiteshire Foods acquired the franchise and rented the property from Flamingo Properties.

Each of the parties owned a 50% interest in each entity. As with the other restaurants subsequently purchased as described below, Plaintiff was responsible for managing the Ogden restaurant and liaising with Smithfield's corporate management at SMC/Cary Keisler, and Defendant provided the collateral necessary to secure financing to purchase the property (which was also secured by personal guarantees from both Plaintiff and Defendant) but otherwise had a largely passive role in the joint ventures.

Several years later, through Flamingo Properties, the parties purchased another property in Wilmington, and Whiteshire Foods began to operate a Smithfield's franchise thereupon pursuant to a franchise agreement with Smithfield's. In 2007, the parties created Flamingo South, LLC (together with Flamingo Properties, the "LLCs"), for the purpose of acquiring and operating another Smithfield's restaurant in Leland. As with Flamingo Properties, each of the parties owned a 50% interest in Flamingo South. Flamingo South purchased the Leland property, and the parties began operating a Smithfield's franchise thereupon in 2008 through a separate operating entity they created and pursuant to a franchise agreement with Smithfield's. Flamingo South purchased another property in Shallotte in 2013, and the parties began operating another Smithfield's franchise thereupon in 2014 through another operating entity they created and pursuant to a franchise agreement with Smithfield's.

In 2010, Smithfield's sent a notice to the parties that their franchises were not being operated in compliance with the applicable franchise agreements as required. Plaintiff responded to Smithfield's that he would address the deficiencies.

In early February 2015, the parties met with David Harris, a Cary Keisler executive, who told them that their franchises were not being operated in compliance with the applicable franchise agreements. Rather than invoke Smithfield's rights to terminate the franchises, Harris proposed (1) purchasing the Leland and Shallotte franchises from the operating entities, and renting those properties from the LLCs, and (2) allowing the parties (through the relevant operating entities) to continue

to operate the Ogden and Wilmington franchises, contingent upon Plaintiff's increased attention to the operational deficiencies in those locations. The parties agreed to Harris' proposed deal.

In late May 2015, Harris visited the Ogden and Wilmington franchises, and found them in unacceptably-poor condition. On 23 May 2015, Harris met with Plaintiff at the Ogden franchise, and physically barred Plaintiff from the premises, telling Plaintiff that (1) the Ogden franchise was terminated effective immediately, (2) Plaintiff was to have no further contact with Smithfield's or its employees, and further communication with Smithfield's would have to be through Defendant, and (3) Plaintiff would get no "golden parachute" from the company. Plaintiff contacted Defendant the same day and told him about the incident. On 26 May 2015, Smithfield's formally notified the parties by letter that the parties' remaining franchises were being terminated.

Defendant decided to end his business relationship with Plaintiff. Defendant consulted Jeffrey Keeter, the attorney to the parties' joint ventures, and Keeter advised Defendant to try to buy Plaintiff out of his interests in the LLCs. Defendant and Plaintiff met multiple times and negotiated the terms of Plaintiff's buyout, by which Plaintiff agreed to assign his interests in the LLCs back to the LLCs in exchange for a promissory note signed by the LLCs entitling Plaintiff to (1) $375,000 paid in monthly payments over five years, (2) car and car insurance payments for two years, (3) health insurance payments for two years, and (4) cellular telephone payments for two years. Defendant had Keeter draft a Membership Redemption Agreement providing for the assignment of the LLC interests in exchange for the consideration described above, including a promissory note entitling Plaintiff to $375,000 in payments from the LLCs over a period of 60 months (collectively, the "Redemption Agreement"). Keeter reviewed the Redemption Agreement with Plaintiff, explained the legal effect of the Redemption Agreement to Plaintiff, and asked Plaintiff whether he had any questions about the Redemption Agreement; Plaintiff told Keeter that he had none. The parties executed the Redemption Agreement on 29 May 2015, which contained a merger clause stating that it comprised the entire agreement between the parties.

At no time prior to executing the Redemption Agreement did Plaintiff contact Harris or anyone else at Smithfield's to inquire as to what Smithfield's might do if Plaintiff retained an interest in the LLCs. Plaintiff has received all benefits contemplated by the Redemption Agreement.

Plaintiff filed a complaint against Defendant and the LLCs on 26 January 2016 bringing causes of action for breach of contract, fraud

and misrepresentation, constructive fraud, breach of fiduciary duty, unjust enrichment, unfair and deceptive trade acts, and breach of the implied covenant of good faith and fair dealing in connection with the Redemption Agreement transaction. Plaintiff also purported to bring causes of action for specific performance and constructive trust, and filed a notice of *lis pendens* against the land held by the LLCs. Distilled to its essence, the complaint alleged that Plaintiff was tricked by Defendant into believing that Smithfield's had told Defendant that Plaintiff was required to divest himself of his interests in the LLCs, and that in inducing Plaintiff to execute the Redemption Agreement, Defendant had represented to him that the Redemption Agreement was a meaningless transaction necessary to appease Smithfield's that Plaintiff was no longer involved with what had been the parties' joint venture.

On 2 May 2016, Defendant and the LLCs moved to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2016). On 6 July 2016, Defendant withdrew the Rule 12 motion in his individual capacity, and on 12 July 2016 the trial court granted the LLCs' Rule 12 motion, leaving only Plaintiff's causes of action as alleged against Defendant personally. The 12 July 2016 order also struck the notices of *lis pendens* filed by Plaintiff.

On 29 July 2016, Defendant answered, asserted a number of affirmative defenses, and filed counterclaims against Plaintiff for breach of contract and breach of fiduciary duty. Plaintiff replied to Defendant's counterclaims on 2 and 9 September 2016.

On 27 February 2017, following discovery, Defendant moved the trial court under N.C. Gen. Stat. § 1A-1, Rule 56 (2017), for summary judgment. Plaintiff then moved the trial court pursuant to N.C. Gen. Stat. § 1A-1, Rule 15 (2017), for leave to amend his complaint and reply to Defendant's counterclaims on 22 May 2017.

On 15 August 2017, the trial court ruled on Defendant's Rule 56 motion, granting Defendant summary judgment as to Plaintiff's cause of action for unfair and deceptive trade acts, but denying Defendant's motion as to Plaintiff's other causes of action. On 18 December 2017, based on agreement of the parties, the trial court granted Plaintiff's motion to amend the complaint, and set the matter for bench trial. Plaintiff's amended complaint added causes of action for fraud in the inducement, mutual mistake, unilateral mistake, and unconscionability.

On 22 December 2017, Defendant moved to dismiss Plaintiff's amended complaint under N.C. Gen. Stat. § 1A-1, Rules 9(b) and 12(b)(6) (2017), and again moved the trial court for summary judgment under Rule 56. The trial court denied Defendant's motions on 7 February 2018.

A trial on the issues was held on 12 February 2018, and on 14 February 2018 the trial court entered an order dismissing all of Plaintiff's causes of action with prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) (2018). The trial court concluded that Plaintiff had not shown a right to relief under any of his causes of action, and that Plaintiff had ratified the Redemption Agreement by accepting the benefits thereof after learning that Smithfield's had not required Plaintiff to divest himself of his interests in the LLCs. Defendant voluntarily dismissed his counterclaims pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a) and (c) (2018), the following day. Plaintiff timely appealed.

II. Discussion

On appeal, Plaintiff contends that the trial court erred by (1) making findings of fact unsupported by competent evidence in the record and (2) making erroneous conclusions of law in dismissing Plaintiff's causes of action sounding in fraud, mistake, breach of fiduciary duty, unjust enrichment, constructive trust, breach of the implied covenant of good faith and fair dealing, and unconscionability.

a. Standard of Review

Rule 41(b)—pursuant to which the trial court involuntarily dismissed Plaintiff's causes of action—reads in relevant part as follows:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).

N.C. Gen. Stat. § 1A-1, Rule 41(b).

Our Supreme Court has elaborated:

> [T]he trial judge has the power under Rule 41(b) to adjudicate the case on the merits at the conclusion of the plaintiff's evidence; and is not obliged to consider plaintiff's evidence in a light most favorable to plaintiff as he would have to do in a jury case. . . . When a motion to dismiss

> pursuant to 41(b) is made, the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him. He passes upon the credibility of the witnesses and the weight to be given to their testimony.

Dealers Specialties, Inc. v. Neighborhood Hous. Servs., Inc., 305 N.C. 633, 639-40, 291 S.E.2d 137, 141 (1982) (internal quotation marks and citations omitted).

We review a trial court's dismissal under Rule 41(b) to determine (1) whether the trial court's findings of fact are supported by competent evidence, and (2) whether the findings of fact support the trial court's conclusions of law and the judgment. *Cohen v. McLawhorn*, 208 N.C. App. 492, 498, 704 S.E.2d 519, 524 (2010). The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if there is evidence to support findings to the contrary. *McNeely v. S. Ry. Co.*, 19 N.C. App. 502, 505, 199 S.E.2d 164, 167 (1973). Where findings of fact are not disputed on appeal, we deem them supported by competent evidence, and they are binding on appeal. *State v. McLamb*, 186 N.C. App. 124, 125, 649 S.E.2d 902, 903 (2007). We review the trial court's conclusions of law *de novo*. *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992).

b. Findings of Fact

[1] Plaintiff first argues that the trial court made a number of findings of fact that are unsupported by competent evidence in the record. In his brief, Plaintiff "specifically assigns error" in a single sentence to a list of 19 of the trial court's findings of fact, but provides no rationale as to why Plaintiff believes any of those findings, except for findings of fact 24 and 31, were erroneous. Although Plaintiff elsewhere in his brief again mentions findings of fact 25, 33, 39, and 43, Plaintiff does not explain why these findings are erroneous, and even cites to one of them to support his own argument, *see* Appellant's Brief, at 16 ("The Court's finding of fact 25 backs up this contention."). Accordingly, Plaintiff's arguments regarding all but findings of fact 24 and 31 are deemed abandoned. N.C. R. App. P. 28(b)(6) (2018) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."); *Cox v. Cox*, 238 N.C. App. 22, 29, 768 S.E.2d 308, 313 (2014) ("As to the remaining findings of fact listed in this subsection of defendant's argument, defendant does not specifically support her challenge with any contention, and we deem those arguments abandoned.").

We conclude that finding of fact 24—to wit, that the Leland and Shallotte franchises were underperforming and that Plaintiff was not properly overseeing the franchises generally—is not material to any of the trial court's legal conclusions appealed by Plaintiff, and as such, cannot be the basis for reversal. *In re Custody of Stancil*, 10 N.C. App. 545, 549, 179 S.E.2d 844, 847 (1971) ("Immaterial findings of fact are to be disregarded."). Plaintiff's argument regarding finding of fact 24 is accordingly unavailing.

The contested portion of finding of fact 31 states that "Defendant stood to lose substantially more in the event of a loan default and foreclosure, having placed his separately owned property and cash as collateral." This finding is supported by Plaintiff's own testimony that it was Defendant who provided the collateral necessary to obtain financing for the parties' joint ventures, and that Defendant would be most impacted in the event of foreclosure.

Plaintiff argues that he "stood to lose his entire income" in such a scenario, which he considers "substantially more," ostensibly on a relative basis. But Plaintiff's reading of finding of fact 31 misconstrues the finding. The trial court found that Defendant stood to lose more than Plaintiff, without any qualifier that it calculated the values of the parties' prospective individual losses in relation to the parties' individual wealth or other individual income. Thus, assuming *arguendo* that finding of fact 31 is not immaterial to the trial court's conclusions of law, we conclude that it is supported by competent evidence in the record.

Accordingly, the trial court's relevant findings of fact are supported by competent record evidence, and are thus binding for purposes of our analysis.[1]

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1. In the section of his brief regarding the trial court's findings of fact, Plaintiff also argues that "nowhere in the findings of fact is the most crucial portion of the case," i.e., "whether or not [Defendant] made specific representations to [Plaintiff which] induced [Plaintiff] to sign the Redemption Agreement." A trial court's failure to find a fact is not error unless the fact is necessary to support the trial court's order. *Graybar Elec. Co. v. Shook*, 283 N.C. 213, 217, 195 S.E.2d 514, 516 (1973) ("When findings of fact sufficient to determine the entire controversy are made by the court, failure to find other facts is not error."). As such, we address Plaintiff's argument in section II(c), in which we analyze the trial court's conclusions of law that Plaintiff did not show a right to relief on his causes of action sounding in fraud.

c. Fraud

[2] Although Plaintiff has appealed the dismissal of his causes of action for both fraud and misrepresentation[2] and fraud in the inducement, both causes of action concern Plaintiff's allegation that Defendant told Plaintiff that Smithfield's required Plaintiff to divest his LLC interests, which Plaintiff alleges fraudulently induced Plaintiff to execute the Redemption Agreement. Under North Carolina law, a plaintiff bringing causes of action under either fraud and misrepresentation or fraud in the inducement theories are required to convince the fact finder to find that the defendant falsely represented or concealed a material fact.[3] Since (1) the alleged facts underlying both of the fraud-based causes of action here before us are the same, (2) both causes of action require the fact finder to find that the defendant falsely represented or concealed a material fact, and (3) as discussed below, we discern no error from the trial court's failure to find that Defendant falsely represented or concealed anything from Plaintiff and thus discern no error with respect to the dismissal of either of the fraud-based causes of action, we analyze Plaintiff's fraud-based causes of action together as a cause of action alleging fraud.

"To establish a claim for fraud, plaintiff must show that: (1) defendant[] made a representation of a material past or existing fact; (2) the representation was false; (3) defendant[] knew the representation was false or made it recklessly without regard to its truth or falsity; (4) the representation was made with the intention that it would be relied upon; (5) plaintiff did rely on it and that her reliance was reasonable; and (6) plaintiff suffered damages because of her reliance." *Broughton*, 161 N.C. App. at 31, 588 S.E.2d at 29 (citation omitted).

In support of his argument that the trial court erred in dismissing his fraud-based causes of action, Plaintiff points to three alleged misrepresentations by which he argues Defendant fraudulently caused him to enter into the Redemption Agreement: (1) Defendant's telling Plaintiff that Smithfield's required Plaintiff to divest his interests in the LLCs, (2) that the parties "just had to get some agreement on paper" in order

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2. North Carolina courts analyze a cause of action alleging fraud and misrepresentation as a cause of action alleging fraud. *See, e.g.*, *Folmar v. Kesiah*, 235 N.C. App. 20, 25, 760 S.E.2d 365, 367 (2014) (analyzing the plaintiff's "fraud and misrepresentation claim" as alleging fraud).

3. *Compare Broughton v. McClatchy Newspapers, Inc.*, 161 N.C. App. 20, 31, 588 S.E.2d 20, 29 (2003) (elements of fraud), *with Harton v. Harton*, 81 N.C. App. 295, 298-99, 344 S.E.2d 117, 119-20 (1986) (elements of fraud in the inducement).

to appease Smithfield's, and (3) that "everything would be okay" if they did so.

Regarding the second and third alleged misrepresentations, such statements are not actionable as fraud because neither are a representation of a material past or existing fact upon which Plaintiff could have reasonably relied. *See Broughton*, 161 N.C. App. at 31, 588 S.E.2d at 29 ("To establish a claim for fraud, plaintiff must show that: (1) defendants made a representation of a material past or existing fact; . . . [and] (5) plaintiff did rely on [the representation] and that her reliance was reasonable" (citation omitted)); *see also State v. Williams*, 98 N.C. App. 274, 280, 390 S.E.2d 746, 749 (1990) (in the securities fraud context, a fact is material when "there is a substantial likelihood that a reasonable [purchaser] would consider [the fact] important in deciding" whether or not to make the purchase (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976))).

Regarding the first alleged misrepresentation, Plaintiff asserts on appeal that "it is uncontested that [Defendant] represent[ed] to [Plaintiff]: (1) that [Plaintiff] would have to divest his interest in both the businesses and land-holding entities in order for the businesses to continue[.]" But Plaintiff's assertion is not accurate. The record shows that Defendant, in his answer, denied Plaintiff's allegation that Defendant made such a representation to Plaintiff, and Defendant argues on appeal that the only evidence that such a statement was made is Plaintiff's own testimony. Plaintiff does not rebut Defendant's argument in a reply brief, *see* N.C. R. App. P. 28(h), by citing to record evidence that corroborates Plaintiff's testimony, and our review of the record reveals none.

It was the trial court's prerogative to weigh all of the evidence and to decide whether it was convinced that Defendant made such a statement to Plaintiff.[4] *See In re Patron*, 250 N.C. App. 375, 384, 792 S.E.2d 853, 860 (2016) ("[W]hen a trial judge sits as both judge and juror, as he or she does in a non-jury proceeding, it is that judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable

4. Plaintiff argues in his brief that Defendant told Keeter that Plaintiff "had to be out of both the restaurants and land ownership" in an attempt to support his fraud arguments. But because Plaintiff does not allege that Plaintiff relied upon the alleged statement to Keeter—let alone that Plaintiff did so reasonably—this alleged statement cannot be actionable as fraud. *Broughton*, 161 N.C. App. at 31, 588 S.E.2d at 29 ("To establish a claim for fraud, plaintiff must show that: . . . (4) the representation was made with the intention that it would be relied upon; [and] (5) plaintiff did rely on it and that her reliance was reasonable." (citation omitted)).

inferences to be drawn therefrom[.]" (citation omitted)). Moreover, it was within the trial court's discretion to determine Plaintiff's testimony was not credible, and to decline to find facts based upon Plaintiff's testimony. *See id.* (holding no error for failure to find a fact, reasoning that "[i]f the trial court did not make a finding of fact with regards to Appellant's self-defense claim, it simply means that the trial court was not convinced that it was valid."); *see also Agee v. Thomasville Furniture Prods.*, 119 N.C. App. 77, 83, 457 S.E.2d 886, 890 (1995) (holding trial court's finding of the absence of a fact testified to by the plaintiff was supported by competent evidence where the trial court found the plaintiff not credible).

As such, we conclude that the trial court did not err in determining that Plaintiff did not show a right to relief on his fraud-based causes of action.

d. Mistake

[3] Plaintiff argues that the trial court erred by dismissing Plaintiff's causes of action seeking to set aside the Redemption Agreement under the doctrines of unilateral mistake and mutual mistake.

i. Unilateral mistake

Under the doctrine of unilateral mistake, a contract may be avoided when one party makes a mistake induced by "fraud, imposition, undue influence, or like oppressive circumstances" attributable to his counterparty. *Marriott Fin. Servs., Inc. v. Capitol Funds, Inc.*, 288 N.C. 122, 136, 217 S.E.2d 551, 560 (1975).

As explained above, we discern no error in the trial court's conclusion that Plaintiff has not shown that Defendant defrauded him. Plaintiff makes no argument that he was subjected to imposition or undue influence, and his arguments regarding other oppressive circumstances—e.g., that Plaintiff was placed under duress by virtue of Defendant's alleged misrepresentation, and that Defendant breached a fiduciary duty owed to him—are unavailing as a matter of law. *See Link v. Link*, 278 N.C. 181, 194, 179 S.E.2d 697, 705 (1971) (duress requires wrongful act of another); Section II(e)(i) *infra* (holding no breach of fiduciary duty). Accordingly, we conclude that the trial court did not err in determining that Plaintiff did not show a right to relief under the doctrine of unilateral mistake.

ii. Mutual mistake

Under the doctrine of mutual mistake, "a contract may be avoided on the ground of mutual mistake of fact when there is a mutual mistake

of the parties as to an existing or past fact that is material and enters into and forms the basis of the contract or is 'of the essence of the agreement.' " *Creech v. Melnik*, 347 N.C. 520, 527, 495 S.E.2d 907, 912 (1998) (citation omitted). Plaintiff argues that Defendant "was mistakenly operating under the fact that Smithfield had directed him that [Plaintiff] could no longer be involved in the business in any capacity, even as landlord." Plaintiff thus alleges a mistake as to an existing or past fact—i.e., that Smithfield's had directed Defendant that Plaintiff could not hold interests in the LLCs going forward—which became a mutual mistake of fact that formed the "entire basis of signing the [Redemption] Agreement" when Defendant communicated that fact to Plaintiff in negotiating the Redemption Agreement.

But the trial court did not find that Defendant believed that Smithfield's had given him any direction about Plaintiff's involvement with the LLCs, let alone that Defendant told Plaintiff that he had been so directed. Before the trial court, Defendant gave the following testimony:

> Q. You never told [Plaintiff] that Mr. Harris told you that [Plaintiff] had to get out of the real estate LLCs, did you?
>
> A. No, sir.

As finder of fact, the trial court was free to believe Defendant's testimony. And as discussed above in section II(c), the trial court was also free to disbelieve the only evidence to the contrary: Plaintiff's own testimony. Since a fact finder's determinations regarding weight and credibility of evidence are conclusive on appeal, *Chloride, Inc. v. Honeycutt*, 71 N.C. App. 805, 806, 323 S.E.2d 368, 369 (1984) ("It is not for us, as an appellate court, to determine the weight and credibility to be given evidence in the record."), by believing Defendant and disbelieving Plaintiff, the trial court conclusively rejected Plaintiff's argument that there was a mutual mistake as to a past or existing fact here.

We accordingly conclude that the trial court did not err in determining that Plaintiff had not shown a right to relief under the doctrine of mutual mistake.

e. Plaintiff's Remaining Causes of Action

Plaintiff also argues that the trial court erred by dismissing Plaintiff's causes of action alleging breach of fiduciary duty, unjust enrichment, breach of the implied covenant of good faith and fair dealing, unconscionability, and constructive trust.

i. Breach of fiduciary duty

[4] The elements of a breach of fiduciary duty cause of action are: (1) a fiduciary relationship existed between the parties; (2) the defendant breached the fiduciary duty owed to the plaintiff; and (3) the breach proximately caused the plaintiff injury. *See Green v. Freeman*, 367 N.C. 136, 141, 749 S.E.2d 262, 268 (2013). Members of a North Carolina limited liability company, like the parties to this lawsuit, do not owe fiduciary duties to each other that can be breached. *Kaplan v. O.K. Techs., L.L.C.*, 196 N.C. App. 469, 473, 675 S.E.2d 133, 137 (2009) ("Members of a limited liability company are like shareholders in a corporation in that members do not owe a fiduciary duty to each other or to the company."). Accordingly, we conclude that the trial court did not err in determining that Plaintiff did not show a right to relief on his cause of action alleging breach of fiduciary duty.

ii. Unjust enrichment

[5] "The general rule of unjust enrichment is that where services are rendered and expenditures made by one party to or for the benefit of another, without an express contract to pay, the law will imply a promise to pay a fair compensation therefor." *Krawiec v. Manly*, 370 N.C. 602, 615, 811 S.E.2d 542, 551 (2018) (citation omitted). However, where "a contract exists between the parties, the law will not imply a contract." *Se. Shelter Corp. v. Btu, Inc.*, 154 N.C. App. 321, 331, 572 S.E.2d 200, 207 (2002). Because Plaintiff and Defendant are contractual counterparties, the trial court did not err in determining that Plaintiff did not show a right to relief on his unjust enrichment cause of action.

iii. Breach of implied covenant of good faith and fair dealing

[6] "There is implied in every contract a covenant by each party not to do anything which will deprive the other parties thereto of the benefits of the contract." *Bicycle Transit Auth. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (citation omitted). But Plaintiff makes no allegation that he has been deprived of the benefits of the Redemption Agreement. Indeed, the record shows that Plaintiff admitted that he has received the benefits bargained for, including cashing every one of the checks remitted to him by the LLCs in accordance with the Redemption Agreement's provisions.

Since the record does not reflect that Plaintiff was deprived of the benefits of the Redemption Agreement, we conclude that the trial court did not err in determining that Plaintiff did not show a right to relief on his cause of action alleging breach of the implied covenant of good faith and fair dealing.

iv. Unconscionability

> **[7]** A court will find a contract to be unconscionable only when the inequality of the bargain is so manifest as to shock the judgment of a person of common sense, and where the terms are so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other. An inquiry into unconscionability requires that a court consider all the facts and circumstances of a particular case, and if the provisions are then viewed as so one-sided that the contracting party is denied any opportunity for a meaningful choice, the contract should be found unconscionable. . . . A party asserting that a contract is unconscionable must prove both procedural and substantive unconscionability. . . . [P]rocedural unconscionability involves bargaining naughtiness in the form of unfair surprise, lack of meaningful choice, and an inequality of bargaining power. Substantive unconscionability, on the other hand, refers to harsh, one-sided, and oppressive contract terms.

Tillman v. Commer. Credit Loans, Inc., 362 N.C. 93, 101-03, 655 S.E.2d 362, 369-70 (2008) (internal quotation marks, brackets, and citations omitted), *abrogated as discussed in Torrence v. Nationwide Budget Fin.*, 232 N.C. App. 306, 322-23, 753 S.E.2d 802, 811-12 (2014).

Plaintiff's sole argument in support of his unconscionability cause of action is that signing the Redemption Agreement caused him to earn less than he allegedly would have earned had he not done so. "The question of unconscionability is determined as of the date the contract was executed[,]" *Weaver v. St. Joseph of the Pines, Inc.*, 187 N.C. App. 198, 212, 652 S.E.2d 701, 712 (2007), meaning that a court will not adjudge a contract based upon how uncertain events unfolded following the contract's execution. As such, even presuming that Plaintiff established at trial that the LLCs brought in income following the Redemption Agreement's execution sufficient to render the bargain Plaintiff made relatively uneconomical, a bad bargain does not render a contract unconscionable absent evidence that the contract was tainted by, e.g., unequal bargaining positions, oppression, and the like. *See Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 90, 721 S.E.2d 712, 722 (2012) ("People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain." (citation omitted)).

The record here shows that Plaintiff negotiated the Redemption Agreement with Defendant based upon the same information and upon equal terms, that Plaintiff admitted that the terms of the contract were all true and that he understood what he was signing, and that Plaintiff walked away with hundreds of thousands of dollars and various benefits guaranteed in exchange for his share of the LLCs' uncertain future profits.

We accordingly conclude that the trial court did not err in determining that Plaintiff did not show a right to relief on his unconscionability cause of action.

v. Constructive trust

[8] As the trial court correctly noted, a constructive trust is a remedy, not a cause of action, and is "merely a procedural device by which a court of equity may rectify certain wrongs." *Weatherford v. Keenan*, 128 N.C. App. 178, 179, 493 S.E.2d 812, 813 (1997) (citation omitted); *see Sara Lee Corp. v. Carter*, 351 N.C. 27, 35, 519 S.E.2d 308, 313 (1999) ("Courts of equity will impose a constructive trust to prevent the unjust enrichment of the holder of the legal title to property acquired through a breach of duty, fraud, or other circumstances which make it inequitable for him to retain it against the claim of the beneficiary of the constructive trust." (citation omitted)). Since, as discussed above, we conclude that the trial court did not err by determining that Plaintiff has not shown any fraud or breach of fiduciary duty by Defendant, and since we discern no other circumstances justifying the imposition of a constructive trust upon Defendant, we conclude that the trial court did not err in dismissing Plaintiff's cause of action for constructive trust.

f. Ratification

Because we conclude that the trial court did not err in determining that Plaintiff has not shown any right to relief, we need not address Defendant's affirmative defense of ratification.

III. Conclusion

Because we conclude that the trial court did not err in its findings of fact or in determining that Plaintiff did not show a right to relief under any of his various causes of action, we affirm.

AFFIRMED.

Judges BRYANT and STROUD concur.

PARKER v. COLSON

[266 N.C. App. 182 (2019)]

TERRY PARKER, PLAINTIFF
v.
HENRY COLSON, BARBARA COLSON MYERS, AND VICKIE COLSON, DEFENDANTS

No. COA18-145

Filed 2 July 2019

1. Animals—dog attacks—negligence per se—violation of municipal ordinance—vicious animals—keeping or causing to be kept

There was a genuine issue of material fact as to whether defendant homeowner violated a municipal ordinance regarding the keeping of vicious animals when her brother let his pit bulls (which had attacked another person the previous month) out of their enclosure, resulting in an attack upon plaintiff pedestrian. A fact-finder could conclude that defendant caused the dogs to be kept pursuant to the ordinance by providing the dogs—which were boarded on her sister's next-door property, which had no running water or electricity—with electricity for cooling and water, by storing their food in her house, and by sometimes feeding and caring for the dogs herself.

2. Animals—dog attacks—negligence per se—violation of municipal ordinance—unrestrained dogs

In an action arising from a dog attack, the trial court properly granted summary judgment for defendant homeowner on a per se negligence claim that was based on an alleged municipal ordinance violation. The ordinance made it unlawful for any person to "cause, permit, or allow" a dog to be away from the owner's premises unrestrained, but defendant was not present on the premises when her brother let his dogs out of their enclosure.

3. Animals—dog attacks—negligence per se—violation of municipal ordinance—general liability—no duty of care

In an action arising from a dog attack, the trial court properly granted summary judgment for defendant homeowner on a per se negligence claim that was based on an alleged municipal ordinance violation. The ordinance, which made the custodian of every animal liable for the animal, imposed no duty of care on custodians and thus could not serve as the basis for a negligence per se claim.

4. Animals—dog attacks—premises liability—dogs kept on sister's next-door property—sufficiency of control

PARKER v. COLSON

[266 N.C. App. 182 (2019)]

In an action arising from a dog attack, the trial court properly granted summary judgment for defendant homeowner on plaintiff pedestrian's common law negligence claim that was based on premises liability. There was no evidence that defendant homeowner—who helped to provide food, water, and electricity for her brother's pit bulls, which were kept on their sister's next-door property—exercised any control over the manner in which the dogs were enclosed or released from their enclosure. Furthermore, the attack did not occur on defendant's property.

Appeal by Plaintiff from order entered 31 March 2016 by Judge Mary Ann Tally in Anson County Superior Court. Heard in the Court of Appeals 22 August 2018.

Hunter & Everage, PLLC, by Charles Ali Everage, for plaintiff-appellant.

McAngus Goudelock & Courie, PLLC, by John P. Barringer and Meredith L. Cushing, for defendant-appellee.

MURPHY, Judge.

Plaintiff, Terry Parker ("Parker"), challenges the trial court's order granting summary judgment to Defendant, Barbara Colson Myers ("Myers"), on Parker's negligence *per se* claim based upon three municipal ordinances and negligence claim based on a theory of premises liability. We hold the trial court erred in granting Myers's motion for summary judgment on Parker's negligence *per se* claim based on Wadesboro Ordinance § 4-4, but affirm the trial court's order granting Myers's motion for summary judgment on the negligence *per se* claim based on Wadesboro Ordinances §§ 4-7 and 4-31. Additionally, we affirm the trial court's order granting Myers's motion for summary judgment on Parker's negligence claim based on a theory of premises liability.

BACKGROUND

Myers is the sole owner of a residential home and the parcel of land upon which it sits at 914 Dora Street in Wadesboro. Immediately adjacent to Myers's parcel of land is a parcel owned by Myers's sister, Vickie Colson ("Vickie"). On Vickie's property at 916 Dora Street sits a little stone house that was uninhabitable and boarded up, with no running water or electricity. There is no fence separating the two parcels. Neither property is the primary residence of either sister. Myers's

primary residence is in Texas, and Vickie's primary residence is in South Carolina. However, at all relevant times, the two sisters and their brother, Henry Colson ("Henry"), all had keys and full access to Myers's home and both parcels of land.

Henry resided in Charlotte and ran a pitbull breeding "business." Henry's girlfriend told him that he could not continue to board his two pitbulls at her residence due to insurance concerns. Henry told his sisters that he would be moving the two dogs to Wadesboro and selling any puppies born on the property. An enclosure was built to board the two dogs on Vickie's property. Myers's home was used to store the food for the dogs, and, since Vickie's property had no running water or electricity, it was also used to provide water and electricity to care for the dogs. In 2013, none of the siblings resided primarily in Wadesboro, despite the dogs being boarded there. Henry would drive from Charlotte only twice a week to feed the dogs; however, when Myers occasionally visited Wadesboro, she would provide the food and water for the dogs.

During one of Myers's visits to her home in Wadesboro, Myers let the two dogs out of their enclosure to roam free in the yard. While the dogs were out of the enclosure, Parker's brother, Tommy Parker ("Tommy"), was walking along Dora Street. Myers yelled at Tommy not to come into the yard because the dogs were roaming free. Hearing Myers yell, the two dogs "just took off." The dogs chased Tommy and "jumped on him," causing a wound that drew blood.

Approximately one month later on 30 August 2013, the date in question, the dogs were let out of the enclosure by Henry and were drinking water from the faucet located on Myers's property. At this time, Parker was walking down the street where the properties were located. While walking, Parker observed the two dogs run from Myers's property towards him. The dogs attacked, leaving Parker hospitalized for 13 days with severe and permanent injuries to his legs.

Parker subsequently brought a personal injury action against Henry, Vickie, and Myers in Anson County Superior Court, the procedural history of which we outlined in *Parker v. Colson*, ___ N.C. App. ___, 795 S.E.2d 654, 2017 WL 490487 (2017) (unpublished):

> In his complaint, [Parker] asserted claims grounded in strict liability and negligence *per se*. [Myers] subsequently filed a motion to dismiss [Parker's] claims against her pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 14 October 2015, the trial court granted [Myers's] motion as to [Parker's] claim based on strict

> liability but denied the motion as to the claim based on negligence *per se*.
>
> On or about 21 January 2016, [Myers] filed a motion for summary judgment as to the remaining claims against her. [Parker] subsequently filed a cross-motion for partial summary judgment against all of the defendants on the issue of negligence *per se*. A hearing was held before the Honorable Mary Ann Tally on 28 March 2016 in connection with the pending motions. On 31 March 2016, the trial court issued an order (1) granting [Parker's] motion for summary judgment on the issue of negligence *per se* as to Henry and Vickie; and (2) granting [Myers's] motion for summary judgment, thereby dismissing all remaining claims against her.

Id. at *1. Parker now appeals the trial court's order granting Myers's motion for summary judgment.

ANALYSIS

A. Standard of Review

Our standard of review for an order granting summary judgment is well established:

> [We] review[] a trial court's entry of summary judgment de novo. Summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the nonmoving party. The moving party has the burden to show the lack of a triable issue of fact and to show that he is entitled to judgment as a matter of law.

Ron Medlin Constr. v. Harris, 364 N.C. 577, 580, 704 S.E.2d 486, 488 (2010) (citations and internal quotation marks omitted). Through this filter, we examine the forecast of evidence and the claims asserted by Parker.

B. Negligence *Per Se*

Parker contends the trial court erred in granting Myers's motion for summary judgment on his claims for negligence *per se* for violations of

§§ 4-4, 4-7, and 4-31 of Wadesboro Code of Ordinances. We discuss each in turn.

"A public safety statute [or ordinance] is one imposing upon the defendant a specific duty for the protection of others." *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 326, 626 S.E.2d 263, 266 (2006) (citation, alteration, and internal quotation marks omitted). A violation of a public safety statute or ordinance constitutes negligence *per se*, unless the statute or ordinance indicates otherwise. *Id.* Accordingly, "[a] member of the class intended to be protected by a statute or regulation who suffers harm proximately caused by its violation has a claim against the violator." *Baldwin v. GTE South, Inc.*, 335 N.C. 544, 546, 439 S.E.2d 108, 109 (1994). Under such a claim, "[t]he statute prescribes the standard, and the standard fixed by the statute is absolute. The common law rule of ordinary care does not apply – proof of the breach of the statute is proof of negligence." *Carr v. Murrows Transfer, Inc.*, 262 N.C. 550, 554, 138 S.E.2d 228, 231 (1964). "But causal connection between the violation and the injury or damage sustained must be shown; that is to say, proximate cause must be established." *Id.*

The rules and canons of construction and interpretation of statutes apply equally to municipal ordinances. *Woodhouse v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 211, 225, 261 S.E.2d 882, 891 (1980).

1. Wadesboro Ordinance § 4-4

[1] Wadesboro Ordinance § 4-4 states:

> It shall be unlawful for any person within the town to keep or cause to be kept any vicious animal unless such vicious animal is confined within a secure building or enclosure, or under restraint.

A "vicious animal" is defined in Wadesboro Ordinance § 4-1 as "any animal that has made an attack on a human being by biting or in any manner causing abrasions or cuts of the skin or one which without provocation attacks other pets." "Under restraint" is defined under Wadesboro Ordinance § 4-1 as follows:

> *Restraint.* An animal is under restraint if:
>
> (1) It is controlled by means of a chain, leash or other like device;
>
> (2) It is at a heel position with the custodian and is obedient to his [or her] commands;

(3) It is in the immediate vicinity of and visible to the custodian and is under his direct voice control and obedient to his command;

(4) It is on or within a vehicle being driven or parked; or

(5) It is within a secure enclosure.

Parker contends there were genuine issues of material fact in that (1) § 4-4 was a public safety ordinance imposing a special duty upon Myers for the protection of others, (2) Parker was a member of the class intended to be protected by the ordinance, and (3) he sustained injuries that were proximately caused by Myers's breach of the ordinance. We agree.

In determining whether an ordinance is a public safety ordinance, we look to whether it is "designed for the protection of life or limb" and "imposes a duty upon members of society to uphold that protection." *State v. Powell*, 336 N.C. 762, 768-69, 446 S.E.2d 26, 29 (1994). This determination is a question of law. In *Powell*, a municipal ordinance provided that "no dog shall be left unattended outdoors unless it is restrained and restricted to the owner's property by a tether, rope, chain, fence or other device." *Id.* at 769, 446 S.E.2d at 30. Our Supreme Court held that the ordinance served the dual purpose of protecting persons as well as property, stating, "the life and limb of pedestrians, joggers, and the public at large are protected by this ordinance . . . by confining the dogs to the owner's property while providing, in some cases, an adequate fence to keep animals and children from accessing the lot and being exposed to the dogs." *Id.* Here, Ordinance § 4-4 is designed for similar purposes. By making it unlawful for a person to keep or cause to be kept a vicious animal unless confined or under restraint as designated, the ordinance protects the public and passersby from any danger posed by vicious animals. Moreover, it imposes a special duty to confine or restrain a vicious animal that they keep or cause to be kept. For these reasons, § 4-4 is a safety ordinance that imposes a special duty upon persons who keep animals within the town.

Next, we consider whether Parker was a member of the class intended to be protected by the ordinance. The evidence forecasted at summary judgment showed that Parker was walking along Dora Street in Wadesboro when the two dogs ran towards and attacked him, causing severe injuries. Parker was a pedestrian and member of the general public, so he is within the intended protected class.

Having determined that § 4-4 is a public safety ordinance and that Parker was a member of the group intended to be protected by the

ordinance, we must next determine whether there was a genuine issue of fact as to Myers's violation of the ordinance that proximately caused Parker's injuries.

Myers does not contest that the two dogs were not confined or under restraint within the meaning of Ordinances §§ 4-1 and 4-4 and were vicious animals under Ordinance § 4-1. Rather, she argues that she could not violate the statute, as she was not "an 'owner' or 'keeper' of the dogs . . . and therefore could not 'keep or cause to be kept' the dogs in question." Myers's argument fails to consider the plain language of the ordinance. There is no language in § 4-4 to indicate that the ordinance only applies to owners of a vicious animal. Moreover, the ordinance does not limit liability to only "keepers" – it expressly states "it shall be unlawful for any person . . . to keep *or cause to be kept* any vicious animal unless . . . ." The ordinance applies not only to those persons who keep a vicious animal themselves, but also persons who cause the vicious animal to be kept. To accept Myers's argument that the statute only applies to owners or keepers would be to render the phrase "cause to be kept" redundant and surplusage. *See Hall v. Simmons*, 329 N.C. 779, 784, 407 S.E.2d 816, 818 (1991) ("The rules of statutory construction require presumptions that the legislature inserted every part of a provision for a purpose and that no part is redundant.").

Taking the evidence in the light most favorable to Parker, there is a genuine issue of fact as to whether Myers caused the two dogs to be kept. Henry stated that the food for the dogs was stored in Myers's house and that the water for the dogs to drink and the electricity to cool the dogs during the hot summer months came from Myers's home with both her knowledge and acquiescence. The food storage, water, and electricity were critical to the keeping of the dogs, as Vickie's home on the property where the dogs were housed was boarded up, with no running water or electricity. Indeed, when Henry was asked whether he could have kept the dogs in their kennel at this location without the use of Myers's home for food storage, water, and electricity, he stated, "No. I couldn't." Additionally, when Myers visited Wadesboro, she would feed and care for the dogs herself so that Henry did not have to drive from Charlotte to Wadesboro. This forecasted evidence, taken in the light most favorable to Parker, shows that Myers's role in keeping the dogs went beyond mere knowledge of their keeping and raises a genuine issue of whether Myers caused the dogs to be kept under the language of Ordinance § 4-4. Because there was a genuine issue of fact as to whether Myers violated Ordinance § 4-4 when she caused to be kept a vicious animal that was not confined within a secure building or enclosure or under

restraint, and whether this violation proximately caused the injuries inflicted upon Parker, the trial court erred in granting Myers's motion for summary judgment on Parker's negligence *per se* claim based on Ordinance § 4-4.

2. Wadesboro Ordinance § 4-7

[2] Wadesboro Ordinance § 4-7 states:

> It shall be unlawful for any person within the town to cause, permit, or allow a dog to be away from the premises of the owner, or to be in a public place, or on any public property in the town, unless such dog is under restraint.

For the same reasons that we concluded that § 4-4 is a public safety ordinance and that Parker was a member of the class intended to be protected by the ordinance, we conclude the same of § 4-7. This ordinance, requiring any dog to be restrained when away from the premises of the owner, in a public place, or public property in the town parallels the ordinance in *Powell* that our Supreme Court concluded "protects people generally by confining the dogs to the owner's property while providing, in some cases, an adequate fence to keep animals and children from accessing the lot and being exposed to the dogs." *Powell*, 336 N.C. at 769, 446 S.E.2d at 30. Parker, as a passerby, was a member of the class of "pedestrians, joggers, and the public at large [to be] protected by this ordinance . . . ." *Id.*

Parker, however, fails to forecast evidence that raises a genuine issue of material fact as to whether Myers violated this ordinance. There is a violation of § 4-7 where an individual causes, permits, or allows a dog to be away from the owner's premises or in any of the listed premises unless under restraint. Therefore, based on the plain language of the ordinance, it must be the act or failure to act by the alleged individual that leads to the dog being away from an owner's premises or in a public place or public property while unrestrained. Here, even taking the evidence in the light most favorable to Parker, there was no such act or omission by Myers that caused, permitted, or allowed the two dogs to be away from Vickie's property on the day in question. Henry was the only individual on the premises that day, and he was the only individual who caused, permitted, or allowed the two dogs to be away from their enclosure and Vickie's property without restraint.

The trial court did not err in granting summary judgment in Myers's favor on Parker's negligence *per se* claim based upon Ordinance § 4-7.

3. Wadesboro Ordinance § 4-31

[3] Wadesboro Ordinance § 4-31 states:

> The custodian of every animal shall be responsible for the care, licensing, vaccination and behavior of such animal.

Custodian is defined under the Municipal Code as "the person owning, keeping, having charge of, sheltering, feeding, harboring, or taking care of any animal, or is otherwise the keeper of an animal. A custodian is not necessarily the owner."

We need not determine whether there was a genuine issue as to whether Myers was a custodian within the meaning of the ordinance, as Ordinance § 4-31 cannot serve as a predicate ordinance upon which a claim of negligence *per se* is based. To establish a negligence *per se* claim, the ordinance must impose *a specific duty* upon a defendant for the protection of others. *Stein*, 360 N.C. at 326, 626 S.E.2d at 266. However, § 4-31 imposes no duty of care on any alleged custodian. Rather, it merely makes a statement of liability without respect to a standard of care to which an individual must abide. Without a standard of care set by the ordinance, there can be no breach of the ordinance to constitute negligence *per se*. *See Carr*, 262 N.C. at 554, 138 S.E.2d at 231 ("The distinction, between a violation of a statute or ordinance which is negligence *per se* and a violation which is not, is one of duty. In the former the duty is to obey the statute, in the latter the duty is due care under the circumstances."). There was no evidence presented that Myers breached this ordinance, and summary judgment based upon this claim was appropriately granted.

C. Premises Liability

[4] Parker also contends the trial court erred in granting Myers's motion for summary judgment on his common law negligence claim. We disagree.

Parker argues that "[c]ommon law has recognized in dog bite cases a negligence claim under the theory of premises liability against a non-owner of the dogs" and cites *Holcomb v. Colonial Assoc., L.L.C.*, 358 N.C. 501, 507, 597 S.E.2d 710, 714 (2004), for this proposition. While Parker is correct that a common law negligence claim may be brought against a non-owner of a dog who injures a plaintiff, he erroneously asserts this doctrine's applicability in the case before us.

In *Holcomb*, our Supreme Court addressed "the issue of whether a landlord can be held liable for negligence when his tenant's dogs injure

a third party." *Holcomb*, 358 N.C. at 503, 597 S.E.2d at 712. In *Holcomb*, defendant Olson resided as a tenant in a home situated on thirteen acres owned by defendant Colonial; Management Associates managed the property for Colonial. *Id.* The plaintiff was a demolition contractor who visited the rental homes on the property to provide Colonial with an estimate for demolition. *Id.* at 504, 597 S.E.2d at 713. One of Olson's two dogs, which Management permitted Olson to keep, lunged at the plaintiff, causing him injuries. *Id.*

Our Supreme Court first noted that "[t]he fact that we recognize a strict liability cause of action against owners and keepers of vicious animals . . . does not preclude a party from alleging negligence (a different cause of action) against a party who may or may not be an owner or keeper of an animal." *Id.* at 507, 597 S.E.2d at 714 (2004). "Under a premises liability theory, the *Holcomb* Court [then] held that the landlord could be held liable because the 'lease provision granted [landlord] sufficient control *to remove the danger* posed by [tenant]'s dogs.' " *Stephens v. Covington*, 232 N.C. App. 497, 499, 754 S.E.2d 253, 255 (2014) (citing *Holcomb*, 358 N.C. at 508-09, 597 S.E.2d at 715). Thus, *Holcomb* and the cases following it make clear that the crux of imposing liability on a landowner for injuries inflicted on a third person by a dog attack under a theory of premises liability is whether the landlord had "sufficient control to remove the danger posed by [the tenant's] dog." *Holcomb*, 358 N.C. at 508-09, 597 S.E.2d at 715; *Stephens*, 232 N.C. App. at 500, 754 S.E.2d at 255 ("[I]t was still clear from [*Holcomb*] that it was not merely the landlord's control of the property, but particularly the landlord's sufficient control to remove the danger posed which resulted in the landlord's liability." (citation and internal quotation marks omitted)).

Even taken in the light most favorable to Parker, there is no evidence Myers exercised sufficient control to remove the danger posed by Henry's dogs. Vickie owned the property where the dogs' enclosure was located, meaning Myers exercised no control over the manner in which the dogs were housed or enclosed. Moreover, Myers exercised no control over the manner in which the dogs were released from that enclosure or whether they were under restraint when released by Henry. Significantly, the attack did not occur on the property owned by Myers. Such circumstances are fundamentally different from those cases cited by *Holcomb* where a landlord had the power to control the harboring of a dog on the landlord's property.[1] Without a forecast of evidence that

1. *See Batra v. Clark*, 110 S.W.3d 126, 129–30 (Tex.App.-Houston 1st Dist. 2003); *see also Uccello v. Laudenslayer*, 44 Cal.App.3d 504, 514, 118 Cal.Rptr. 741, 747 (1975) (holding the landowner had control via the power "to order his tenant to cease harboring the dog

Myers exercised sufficient control to remove the danger posed by the two dogs, Parker's negligence claim based upon a theory of premises liability fails. The trial court did not err in granting Myers's summary judgment on this theory of liability.

CONCLUSION

With respect to Parker's negligence *per se* claim based on Ordinance § 4-4, Myers failed to show that there was no genuine issue of material fact and that she is entitled to judgment as a matter of law. The trial court erred in granting Myers's motion for summary judgment on this claim. The forecasted evidence, however, failed to raise a genuine issue as to whether Myers violated Ordinance § 4-7, and Ordinance § 4-31 fails to establish a standard of care upon which a claim of negligence *per se* can be based. The trial court did not err in granting Myers's motion for summary judgment on Parker's negligence *per se* claim based on these two ordinances. The trial court also did not err in granting Myers's motion for summary judgment on Parker's negligence claim. We reverse in part and remand and affirm in part.

REVERSED in part AND REMANDED; AFFIRMED IN PART.

Judges STROUD and ZACHARY concur.

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under pain of having the tenancy terminated"); *Shields v. Wagman*, 350 Md. 666, 684, 714 A.2d 881, 889–90 (1998) (holding the landowner could exercise control over his tenant's dog by refusing to renew a month-to-month lease agreement); *McCullough v. Bozarth*, 232 Neb. 714, 724–25, 442 N.W.2d 201, 208 (1989) (holding liability may be imposed on a landlord where, "by the terms of the lease, [the landlord] had the power to control the harboring of a dog by the tenant and neglected to exercise that power").

STATE v. CAGLE

[266 N.C. App. 193 (2019)]

STATE OF NORTH CAROLINA
v.
RANDY STEVEN CAGLE, DEFENDANT

No. COA18-720

Filed 2 July 2019

1. Homicide—jury instructions—specific intent—final mandate

In defendant's trial for murder, the trial court did not err by declining to include defendant's requested instruction on specific intent in the final mandate to the jury. Defendant had requested an instruction on his mental condition, and the trial court gave the pattern instruction on voluntary intoxication and its effect on specific intent twice (once for each of the two victims)—and that instruction was not required to be restated in the final mandate.

2. Homicide—jury instructions—request for special instruction—premeditation and deliberation

In defendant's trial for murder, the trial court properly denied defendant's request for a special jury instruction on premeditation and deliberation (which was based on language from a state supreme court opinion) and instead gave the pattern jury instructions on premeditation and deliberation. The instruction was a correct statement of law and embraced the substance of defendant's requested instruction.

3. Homicide—prosecutor's closing arguments—describing defendant as evil—disparaging defendant's expert witnesses

In defendant's trial for murder, the trial court was not required to intervene ex mero motu when the prosecutor described defendant as evil and disparaged his witnesses during closing arguments. North Carolina appellate courts have declined to reverse convictions based on closing arguments referring to defendants as evil, and it was proper for the prosecutor to highlight the potential bias that could result from defendant's expert witnesses being paid for testifying. Even if the prosecutor's reference to the expert witnesses as "hacks" was improper, it was not prejudicial.

Appeal by defendant from judgment entered 18 July 2016 by Judge V. Bradford Long in Randolph County Superior Court. Heard in the Court of Appeals 30 January 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amy Kunstling Irene, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.

BERGER, Judge.

On July 18, 2016, Randy Steven Cagle ("Defendant") was found guilty for the murder of both Tyrone Marshall ("Marshall") and Davida Stancil ("Stancil"). Defendant appeals, arguing that the trial court erred when it did not: (1) include the specific intent jury instruction in the final mandate; (2) instruct the jury with Defendant's requested instruction on deliberation; and (3) intervene *ex mero motu* to strike statements made by the prosecutor during closing arguments. We find no error.

Factual and Procedural Background

On the afternoon of May 7, 2011, Defendant purchased approximately $20.00 of cocaine from Marshall. Defendant called Marshall to complain about the product, and Marshall went to see Defendant at his home. Once Marshall was inside Defendant's home, a fight ensued and Marshall was fatally beaten and stabbed. Defendant then went outside to Marshall's car. Stancil was waiting in the passenger seat with her seat belt still buckled. Defendant broke the passenger window of the vehicle with a baseball bat and fatally stabbed Stancil.

Defendant attempted to dispose of the evidence of his crime by driving Marshall's car about three-tenths of a mile away from his home and abandoning it. Defendant also attempted to clean the crime scene with bleach, and hid two knives under the sink, burned some of Stancil's belongings, and washed his clothes.

The following day, Marshall's abandoned car was found. His body was in the car's backseat and Stancil's body was in the front passenger seat with her seat belt still buckled. Stancil had twenty puncture wounds to her head, jaw, neck, chest and abdomen; defensive wounds on her hands and forearms; and her seatbelt had puncture damage as well. There was broken glass from the passenger window on the driver's seat, and shards of tinted glass were found at Defendant's home. Marshall had puncture wounds to the back of his head, and a very large, gaping wound on the front of his neck.

Defendant was arrested, and on June 6, 2011, he was indicted on two counts of first degree murder. Prior to his arrest, a detective conducted a pat down search and noticed one of Defendant's fingers "had a small cut," but otherwise he had no wounds or bruising.

The State held a Rule 24 hearing on June 28 and announced that it would seek the death penalty. Prior to trial, Defendant filed notice of his intent to introduce evidence of self-defense, mental infirmity, diminished capacity, involuntary intoxication, and/or voluntary intoxication. Defendant also requested before trial that the jury be instructed with additional language on premeditation and deliberation and on specific intent. Defendant's requests were denied.

At trial, Defendant's mental state at the time of the murders was at issue. Multiple medical experts testified and provided their opinions.

During the jury charge conference, the trial court denied Defendant's renewed request for the special instruction concerning Defendant's mental capacity, but did include Defendant's requested instruction on voluntary intoxication. The trial court also denied Defendant's renewed request for a special instruction on premeditation and deliberation, but did not prevent Defendant from arguing Defendant's requested instruction to the jury.

After closing arguments had concluded, Defendant was convicted of two counts of first degree murder. Following the guilt/innocence phase, a capital sentencing hearing was held, and the jury returned recommendations of life imprisonment for both counts. The trial court imposed two consecutive sentences of life without parole.

Defendant timely appeals, arguing that the trial court erred when it: (1) did not give the requested instruction on specific intent in the final mandate; (2) did not give the requested instruction on premeditation and deliberation; and (3) did not intervene *ex mero motu* during the prosecutor's closing argument. We find no error.

I. Jury Instructions

Defendant first contends that the trial court erred when it did not include the specific intent instruction in its final mandate to the jury, and when it did not give his requested instruction on premeditation and deliberation. We disagree.

"Whether the trial court instructs using the exact language requested by counsel is a matter within its discretion and will not be overturned absent a showing of abuse of discretion." *State v. Lewis*, 346 N.C. 141,

145, 484 S.E.2d 379, 381 (1997) (citations, quotation marks, and brackets omitted). "[W]hen a request is made for a specific instruction that is supported by the evidence and is a correct statement of the law, the court, although not required to give the requested instruction verbatim, must charge the jury in substantial conformity therewith." *State v. Daughtry*, 340 N.C. 488, 516, 459 S.E.2d 747, 761 (1995) (citation and quotation marks omitted). However,

> [a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.

N.C.R. App. P. 10(a)(2).

If an instructional error is not preserved below, it nevertheless may be reviewed for plain error "when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C.R. App. P. 10(a)(4).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error "had a probable impact on the jury's finding that the defendant was guilty." Moreover, because plain error is to be "applied cautiously and only in the exceptional case," the error will often be one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quoting *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983) (citations and quotation marks omitted)).

Finally, "[a]n instruction to a jury will not be viewed in isolation, but rather must be considered in the context of the entire charge. Instructions that as a whole present the law fairly and accurately to the jury will be upheld." *State v. Roache*, 358 N.C. 243, 303, 595 S.E.2d 381, 419 (2004) (citations omitted).

A. Specific Intent Instruction

[1] Defendant argues that the trial court erred when it did not include the specific intent instruction in the final mandate. Defendant contends in the alternative that if we determine that this issue was not properly preserved, the trial court's failure to include a specific intent instruction in the final mandate constitutes plain error.

Defendant had filed a request for a special instruction on July 6, 2016, in which he requested that additional language regarding specific intent be added to the pattern jury instruction for first degree murder. However, in this request, Defendant did not ask for that special instruction to be included in the final mandate. During the charge conference, Defendant renewed his special instruction request, which was denied. Again, Defendant did not request that the specific intent instruction be included in the final mandate. Moreover, after the trial court had instructed the jury, and upon the trial court's inquiry as to whether either party had any objections to the instructions as given, Defendant did not object on the grounds that the trial court should have included the specific intent instruction in its final mandate. Because Defendant did not object on the grounds that the specific intent instruction should have been included in the final mandate during either the charge conference or after the jury had been charged, Defendant has not properly preserved this issue for appellate review pursuant to Rule 10(a)(2) of the North Carolina Rules of Appellate Procedure.

However, because this error was not preserved, we must determine whether "the trial court committed plain error in omitting specific intent from the final mandate." Defendant argues that the trial court's error had a probable impact on the jury's finding that he was guilty because, "[h]ad one juror been in doubt about [Defendant's] ability to form specific intent, the result of this case could have been a verdict of second-degree murder." We disagree and do not find plain error.

In North Carolina, it is not necessarily error for the trial court to exclude a portion of a requested jury instruction in its final mandate where this exclusion "could not have created confusion in the minds of the jurors as to the State's burden of proof." *State v. Pittman*, 332 N.C. 244, 258-59, 420 S.E.2d 437, 445 (1992). Additionally, when the trial court includes in its jury charge "an instruction that the jury could consider defendant's mental condition in connection with his ability to formulate a specific intent to kill," it need "not include a similar charge in its final mandate." *Id.* at 258, 420 S.E.2d at 445. Thus, when the trial court gives "the substance of the instruction defendant requested," omission of the

requested instruction from the final mandate does not necessarily constitute plain error. *Daughtry*, 340 N.C. at 516, 459 S.E.2d at 761.

In the present case, Defendant requested an instruction before trial on his mental condition at the time the crime was alleged to have been committed and the effect that voluntary intoxication could have on his ability to form specific intent. When the trial court charged the jury, it gave the North Carolina Pattern Instruction 305.11 on voluntary intoxication and its effect on specific intent twice, once for each of the two victims. This particular instruction does not require that the trial court restate the instruction on specific intent in the final mandate, and the trial court did not err in excluding it from the final mandate.

Moreover, this Court has addressed this allegation of error before, and we are bound by precedent. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

In *State v. Storm*, this Court reviewed for plain error the exclusion from the final mandate of an instruction that the jury could consider defendant's mental condition with regard to his ability to formulate specific intent. *State v. Storm*, 228 N.C. App. 272, 743 S.E.2d 713 (2013). This Court stated:

> In *State v. Pittman*, 332 N.C. 244, 420 S.E.2d 437 (1992), our Supreme Court held that the trial court did not err by denying defendant's request to include an instruction on diminished capacity in its final mandate. *Id.* at 258-59, 420 S.E.2d at 445. Examining the charge as a whole, the Supreme Court determined that the jury could not have been confused as to the State's burden of proof because "[t]he court included in its charge an instruction that the jury could consider defendant's mental condition in connection with his ability to formulate a specific intent to kill." *Id.* Similarly in *State v. Daughtry*, 340 N.C. 488, 459 S.E.2d 747 (1995), when the trial court gave the substance of the instruction defendant requested, the omission of a final mandate including a voluntary intoxication instruction did not constitute plain error. *Id.* at 516, 459 S.E.2d at 761.

Storm, 228 N.C. App. at 276, 743 S.E.2d at 716.

This reasoning and conclusion applies to the error alleged by Defendant here, and we are therefore compelled to come to the same conclusion:

> Examining the jury instructions as a whole, the trial court's instructions do not constitute plain error. Following the instructions on first-degree and second-degree murder, the trial court charged the jury on diminished capacity and voluntary intoxication. The trial court's instruction followed the pattern jury instructions and the trial court gave the instruction twice, once for diminished capacity and once for voluntary intoxication. The voluntary intoxication and diminished capacity instructions each contained mandates, stating that if the jury "[had] reasonable doubt as to whether the defendant formulated the specific intent required for conviction of first-degree murder," they were not to return a verdict of guilty of first-degree murder. These instructions appropriately state the law on diminished capacity and voluntary intoxication. *See State v. Carroll*, 356 N.C. 526, 539-40, 573 S.E.2d 899, 909 (2002) (finding no plain error where the trial court gave pattern jury instructions on diminished capacity). Based upon the facts of this case and considering the trial court's jury instructions as a whole, defendant cannot meet his high burden of showing that the trial court committed plain error.

Id. at 276-77, 743 S.E.2d at 717.

Thus, the trial court did not err in excluding the specific intent instruction from the instruction's final mandate. Accordingly, the trial court did not err and Defendant cannot argue plain error.

B. Premeditation and Deliberation Instruction

[2] Defendant next argues that he was prejudiced by the trial court's failure to give his requested instruction on premeditation and deliberation drawn from *State v. Buchanan*, 287 N.C. 408, 215 S.E.2d 80 (1975). Defendant specifically requested that the following suggested language from *State v. Buchanan* be included in his requested instruction: "for the premeditation the killer asks himself the question, 'Shall I kill him?'. The intent to kill aspect of the crime is found in the answer, 'Yes, I shall.' The deliberation part of the crime requires a thought like, 'Wait, what about the consequences? Well, I'll do it anyway.' " *State v. Buchanan*, 287 N.C. 408, 418, 215 S.E.2d 80, 86 (1975) (citation omitted). We disagree.

Whether the trial court instructs the jury using the pattern jury instructions or "using the exact language requested by counsel is a matter within its discretion and will not be overturned absent a showing of abuse of discretion." *Lewis*, 346 N.C. at 145, 484 S.E.2d at 381 (citation omitted). "As this Court has previously stated, the trial court is not required to frame its instructions with any greater particularity than is necessary to enable the jury to understand and apply the law to the evidence bearing upon the elements of the crime charged." *Id.* (*purgandum*). Furthermore,

> [t]his Court has consistently held that a trial court is not required to give a defendant's requested instruction verbatim. Rather, when the defendant's request is correct in law and supported by the evidence, the court must give the instruction in substance. This rule applies even when the requested instructions are based on language from opinions of the Supreme Court of North Carolina.

State v. Hobbs, ___ N.C. App. ___, ___, 817 S.E.2d 779, 784-85 (2018) (citations and brackets omitted).

> In defining deliberation, this Court has held that deliberation means that defendant carried out the intent to kill in a cool state of blood, not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation. Further, this Court stated that deliberation does not require brooding or reflection for any applicable length of time but connotes the execution of an intent to kill in a cool state of blood without legal provocation in furtherance of a fixed design.

Lewis, 346 N.C. at 146, 484 S.E.2d at 381-82 (*purgandum*). "Premeditation and deliberation are ordinarily not susceptible to proof by direct evidence and therefore must usually be proven by circumstantial evidence." *State v. Leazer*, 353 N.C. 234, 238, 539 S.E.2d 922, 925 (2000) (citation and quotation marks omitted).

Here, Defendant filed a request for a special jury instruction on premeditation and deliberation, based on *Buchanan*, which was denied. Defendant specifically argues that, unlike his requested instruction, the pattern jury instruction neither adequately defines deliberation nor adequately addresses the requirement that, a defendant must have been able to consider the consequences of his actions for guilt to be established. Defendant requested the following instruction:

> The required intent to kill must be turned over in the mind in order for the mental process of premeditation and deliberation to transpire. You may think of premeditation as the killer asking himself the question, "Shall I kill?," however long this process takes. Deliberation is then found in a process like asking, "Wait, what about the consequences? Well, I'll do it anyway." Unless the state proves to you beyond a reasonable doubt that the defendant was able to and did in fact engage in both processes, you must find the defendant not guilty of first degree murder on the basis of premeditation and deliberation.

The request for this instruction was denied, and the trial court instructed the jury on deliberation and premeditation using North Carolina Pattern Instruction 206.10, which states in pertinent part:

> . . . the State must prove to you . . . beyond a reasonable doubt . . .
>
> Fifth, that the Defendant acted with deliberation, which means that the Defendant acted while the Defendant was in a cool state of mind. This does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly aroused, violent passion, it is immaterial that the Defendant was in a state of passion or excited when the intent was carried into effect.
>
> Members of the jury, neither premeditation nor deliberation is usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred, such as the lack of provocation by Mr. Marshall; conduct of the Defendant before, during, and after the killing; threats and declarations of the Defendant; use of grossly excessive force; infliction of lethal wounds after Mr. Marshall is felled; brutal or vicious circumstances of the killing; manner in – manner in which or means by which the killing was done; ill will between the parties.

Defendant takes issue with the fact that the trial court's instruction did not "explain[ ] what deliberation means." However, "[t]he trial court is not required to frame its instructions with any greater particularity than is necessary to enable the jury to understand and apply the

law to the evidence bearing upon the elements of the crime charged." *Lewis*, 346 N.C. at 145, 484 S.E.2d at 381 (citations and quotation marks omitted).

The trial court made a reasoned decision to use the pattern instruction on deliberation, which defined and provided examples of deliberation. Moreover, because the trial court's instruction on deliberation was a correct statement of the law arising from the evidence presented, comported with the pattern jury instruction, and embraced the substance of Defendant's requested instruction, we find no error.

Defendant also asserts that he is entitled to a new trial because he was prejudiced by the omission of his requested instruction. In support of his argument, Defendant cites to North Carolina General Statute Section 15A-1443, which states:

> (a) A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises. The burden of showing such prejudice under this subsection is upon the defendant. Prejudice also exists in any instance in which it is deemed to exist as a matter of law or error is deemed reversible per se.
>
> (b) A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.

N.C. Gen. Stat. § 15A-1443(a), (b) (2017).

Defendant contends that he was prejudiced by the trial court's failure to provide his requested instruction on deliberation because it was relevant to his defense. He further asserts that "if even one juror had reasonable doubt, based on the evidence, that [Defendant] was unable to deliberate his actions and consider the consequences of them, the outcome of the trial might have been different." However, Defendant cannot show prejudice because we have determined that the trial court did not err.

"The nature and number of the victim's wounds is another indicator of premeditation and deliberation. 'The premise of [this] theory of premeditation and deliberation is that when numerous wounds are inflicted,

the defendant has the opportunity to premeditate and deliberate from one blow to the next.' " *Leazer*, 353 N.C. at 239, 539 S.E.2d at 926 (quoting *State v. Austin*, 320 N.C. 276, 295, 357 S.E.2d 641, 653 (1987)) (brackets omitted). At trial, it was revealed that Marshall had multiple lethal and nonlethal injuries, including stab wounds, cuts and punctures, and multiple blunt-force injuries on his head, chest, back, abdomen, arms, and hands. After inflicting these injuries to Marshall, Defendant walked outside and towards Marshall's vehicle. Defendant broke the passenger window and stabbed Stancil twenty times in her head, jaw, neck, chest, and abdomen while she was still seated in the vehicle. Stancil also had at least eight severe defensive wounds on her hands and forearms. "No matter what defendant's intent may have been before he inflicted the first wound, there was adequate time between each blow for defendant to have premeditated and deliberated his actions." *Leazer*, 353 N.C. at 239, 539 S.E.2d at 926. There was such a quantum of evidence from which the jury could find premeditation and deliberation that Defendant would be unable to show prejudice, regardless of which definition was used.

Furthermore, Section 15A-1443(b) is inapplicable because Defendant did not raise any constitutional issues with these jury instructions, either during the jury charge conference or after the charge had been given to the jury. "It is well settled that constitutional matters that are not raised and passed upon at trial will not be reviewed for the first time on appeal." *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) (citation and quotation marks omitted). Thus, any constitutional issues Defendant has raised for the first time on appeal were not preserved for appellate review. *See* N.C.R. App. P. 10(a)(2).

II. Closing Arguments

[3] Defendant further contends that the trial court should have intervened *ex mero motu* to strike statements made by the prosecutor during closing arguments that described Defendant as evil and disparaged Defendant's witnesses. We disagree.

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in

> order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

State v. Jones, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002) (citation omitted).

> [W]hen defense counsel fails to object to the prosecutor's improper argument and the trial court fails to intervene, the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial.

State v. Huey, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017). Only where this Court "finds both an improper argument *and* prejudice will this Court conclude that the error merits appropriate relief." *Id.* (emphasis added). To establish prejudice, the "defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *State v. Waring*, 364 N.C. 443, 499-500, 701 S.E.2d 615, 650 (2010). Also, when this Court is asked to determine the impropriety of a prosecutor's argument, such that it may violate a defendant's right to a fair trial, "[f]air consideration must be given to the context in which the remarks were made and to the overall factual circumstances to which they referred." *State v. Moseley*, 338 N.C. 1, 50, 449 S.E.2d 412, 442 (1994) (citation and quotation marks omitted).

> A well-reasoned, well-articulated closing argument can be a critical part of winning a case. However, such argument, no matter how effective, must: (1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial.

State v. Matthews, 358 N.C. 102, 112, 591 S.E.2d 535, 542 (2004) (citation omitted). Furthermore, an argument must avoid base tactics such as "arguing a witness is lying solely on the basis that he will be compensated." *Huey*, 370 N.C. at 187, 804 S.E.2d at 474.

Defendant first contends that it was grossly improper for the prosecutor to refer to Defendant as evil during closing arguments. However,

"[t]he appellate courts of this State have declined to reverse convictions based on closing arguments referring to defendants [as "vile", "amoral", "wicked", and "evil"] or similar language." *State v. Bullock*, 178 N.C. App. 460, 475, 631 S.E.2d 868, 878 (2006) (citing *State v. Flowers*, 347 N.C. 1, 37-38, 489 S.E.2d 391, 412 (1997); *State v. Larrimore*, 340 N.C. 119, 163, 456 S.E.2d 789, 812-13 (1995); *State v. Riley*, 137 N.C. App. 403, 412-13, 528 S.E.2d 590, 596-597 (2000); *State v. Frazier*, 121 N.C. App. 1, 16, 464 S.E.2d 490, 498 (1995)).

Here, Defendant challenges the prosecutor's use of the word evil during the following parts of closing arguments:

> Evil at his core, his rotten core, evil, and there's no other way to explain what you have seen over the last week and a half but his evil. You cannot butcher two people, butcher them, cover yourself in their life's blood, and then twenty-four hours later sit in an interview with two investigators and laugh and joke. There's no other word for it than evil.
>
> . . . .
>
> The problem with evil is that when you look into the abyss of human evil, the darkness, it is frightening. It is disturbing. And reasonable, good people don't want to admit that that kind of evil walks among us.
>
> There's a saying that when you look into the abyss, you look into the darkness of human evil, the problem is that the abyss looks back into you. And so good people had rather not look at that evil, and so they invent terms like broken brain and they invent excuses like my family and drugs and they invent all kinds of other excuses like, "Well, if my wife had just picked up the phone, I would have told the truth." That's the problem with evil is that good, reasonable people won't – don't want to look at it.
>
> Now, I'm not gonna stand up here and you (*sic*) that Chartier, Wilson, and Hilkey are nothing but hacks in it for the money. I will say, though, that they make a pretty good living making excuses for evil. I'm not saying they're bad people. As a matter of fact, I'm saying they're probably good people that don't want to admit that human evil exists, that this kind of human evil exists, so that in their minds, there's got to be some other excuse.

The prosecutor's reference to either what was shown to the jury during the trial, or to the Defendant himself, as evil was not so grossly

improper that the trial court should have intervened *ex mero motu*. Because North Carolina appellate courts have "declined to reverse convictions based on closing arguments referring to defendants" as "evil," *Bullock*, 178 N.C. App. at 475, 631 S.E.2d at 878, we decline to depart from these prior holdings. Accordingly, the trial court did not err when it declined to intervene *ex mero motu* in the prosecutor's closing argument.

Defendant further contends that it was grossly improper for the prosecutor to refer to Defendant's witnesses as "hacks" during closing arguments. However, "it is proper for an attorney to point out potential bias resulting from payment a witness received or would receive for his services, while it is improper to argue that an expert should not be believed because he would give untruthful or inaccurate testimony in exchange for pay." *Huey*, 370 N.C. at 183, 804 S.E.2d at 471-72 (citation omitted). While it is improper for a prosecutor to strongly insinuate that "the defendant's expert would say anything to get paid," it is "not so grossly improper as to require *ex mero motu* intervention." *State v. Duke*, 360 N.C. 110, 129-30, 623 S.E.2d 11, 24 (2005) (citing *State v. Rogers*, 355 N.C. 420, 464, 562 S.E.2d 859, 886 (2002)). Similarly, referring to a witness as a "$15,000 man" during closing arguments is improper, but not "grossly improper" requiring *ex mero motu* intervention by the trial court. *Duke*, 360 N.C. at 130, 623 S.E.2d at 24.

Here, Defendant challenges the statement above, in which the prosecutor said, "Chartier, Wilson, and Hilkey are nothing but hacks in it for the money. I will say, though, that they make a pretty good living making excuses for evil." Even if we were to assume that reference to Defendant's witnesses as "hacks" was improper, "in determining whether argument was grossly improper, this Court considers the context in which the remarks were made, . . . as well as their brevity relative to the closing argument as a whole." *State v. Taylor*, 362 N.C. 514, 536, 669 S.E.2d 239, 259 (2008) (citation and quotation marks omitted).

After reviewing the prosecutor's closing argument as a whole, this single phrase is not sufficient reason for us to disturb Defendant's judgment. Moreover, "[a]n attorney may . . . on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." N.C. Gen. Stat. § 15A-1230(a) (2017). During trial, all three doctors testified to the amount of money each had made in the past year testifying as an expert witness. Thus, the prosecutor was highlighting a fact in evidence that could have an effect on a witness' credibility. Therefore, while the prosecutor's reference to Defendant's witnesses as "hacks" was improper, it was not prejudicial or "so grossly improper

as to impede the defendant's right to a fair trial." *Huey*, 370 N.C. at 179, 804 S.E.2d at 469. Thus, the trial court did not err when it did not intervene *ex mero motu* in the prosecutor's closing argument. Accordingly, we find no error.

Conclusion

For the reasons stated above, we find that the trial court did not err.

NO ERROR.

Judges STROUD and DIETZ concur.

STATE OF NORTH CAROLINA
v.
STEPHEN TREY FUTRELLE, DEFENDANT

No. COA18-1289

Filed 2 July 2019

Jurisdiction—bill of information—waiver of indictment—section 15A-642(c)—signature of counsel

The trial court lacked jurisdiction to enter judgment on two offenses charged in a bill of information where the bill's waiver of indictment was not signed by defense counsel as required by N.C.G.S. § 15A-642(c).

Appeal by Defendant from order entered 2 May 2018 by Judge R. Allen Baddour, Jr. in Orange County Superior Court. Heard in the Court of Appeals 9 May 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

MURPHY, Judge.

Defendant, Stephen Trey Futrelle, filed a *Motion for Appropriate Relief* ("MAR") in Superior Court, alleging the trial court lacked subject

matter jurisdiction to enter judgment based upon his plea of guilty to felony possession of a Schedule I controlled substance and misdemeanor possession of more than one-half ounce, but less than one and one-half ounces, of marijuana. Defendant argues the bill of information charging him with these two offenses was invalid because the waiver of indictment contained therein was not signed by his attorney as required by N.C.G.S. § 15A-642(c). We agree and vacate the trial court's order denying Defendant's MAR.

BACKGROUND

Defendant was arrested on 23 August 2014 in Orange County for felony possession of MDMA, a Schedule I controlled substance, and misdemeanor possession of more than one-half ounce, but less than one and one-half ounces, of marijuana. On 7 January 2015, Defendant was charged with these two offenses by bill of information. The bill of information contained a waiver of indictment, which was signed by the prosecutor for the State and Defendant. Defendant's attorney did not sign the waiver of indictment included in the bill of information.

Defendant later pled guilty to the two offenses charged, and the trial court accepted Defendant's plea. The trial court entered a conditional discharge on 7 January 2015 and placed Defendant on supervised probation for 12 months. The conditions of Defendant's probation were twice modified, in May and October 2015. On 31 March 2017, judgment was entered on the two offenses, and the trial court imposed a suspended sentence, placing Defendant on supervised probation for 12 months. Defendant completed probation on 31 March 2018.

On 13 April 2018, Defendant filed an MAR claiming the Superior Court lacked jurisdiction to enter judgment on the two offenses because the bill of information was invalid due to the absence of his counsel's signature. The trial court denied Defendant's MAR, making the following conclusions of law:

> 1. The purpose of NCGS 15A-642 is to ensure that defendants not indicted by the grand jury only appear by bill of information and waiver of the grand jury indictment with the advice and consent of counsel.
>
> 2. Defendant signed the bill of information and though counsel did not, it is clear that the case proceeded with the advice and consent of counsel, as the Transcript of Plea and Conditional Discharge were all executed on the same day (January 7, 2015).

3. These documents, when read together, clearly indicate that the information was executed knowingly and voluntarily.

4. The statutory requirements have been substantially met.

We allowed Defendant's petition for writ of certiorari for the purpose of reviewing the trial court's order denying Defendant's MAR.

ANALYSIS

Defendant argues the trial court erred in concluding that the requirements set by N.C.G.S. § 15A-642 for a valid waiver of indictment were satisfied in this case. He contends that without a valid waiver of indictment, the Superior Court lacked jurisdiction to enter judgment on the two offenses. We agree.

Under N.C.G.S. § 15A-1415, a "defendant may assert by a motion for appropriate relief" that "[t]he trial court lacked jurisdiction over the person of the defendant or over the subject matter." N.C.G.S. § 15A-1415(b) (2017). "When considering rulings on motions for appropriate relief, we review the trial court's order to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court." *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (citation and internal quotation marks omitted).

The North Carolina Constitution provides that "[e]xcept in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment. But any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases." N.C. Const. art. I, § 22. Thus, "[t]he pleading in felony cases and misdemeanor cases initiated in the [S]uperior [C]ourt division must be a bill of indictment, unless there is a waiver of the bill of indictment as provided in G.S. § 15A-642. If there is a waiver, the pleading must be an information." N.C.G.S. § 15A-923(a) (2017).

N.C.G.S. § 15A-642 proscribes when an indictment may be waived and the requirements for a valid waiver. The "[i]ndictment may not be waived in a capital case or in a case in which the defendant is not represented by counsel." N.C.G.S. § 15A-642(b) (2017). Additionally, the waiver "must be in writing and signed by the defendant and his attorney. The waiver must be attached to or executed upon the bill of information." N.C.G.S. § 15A-642(c) (2017). Therefore, in a non-capital case in which a defendant is represented by counsel, a waiver of indictment

is not valid unless it is (1) in writing, (2) signed by the defendant, (3) signed by his or her attorney, and (4) attached to or executed upon the bill of information.

The statutory requirements of N.C.G.S. § 15A-642 are "intended to carry out the constitutional mandate of Article I, Section 22" and are "jurisdictional and mandatory." *State v. Nixon*, ___ N.C. App. ___, ___, 823 S.E.2d 689, 692 (2019). In *Nixon*, the bill of indictment "contain[ed] absolutely no language waiving indictment and no waiver appear[ed] to be attached or included in the Record . . . ." *Id.* In *State v. Neville*, 108 N.C. App. 330, 423 S.E.2d 496 (1992), neither the "defendant nor his attorney signed the waiver of a Bill of Indictment attached to the Bill of Information . . . ." *Id.* at 332, 423 S.E.2d at 497. In both cases, we held that the absence of a valid waiver under N.C.G.S. § 15A-642 deprived the trial court of jurisdiction to accept the defendants' guilty pleas and to enter judgment. *Id.* at 333, 423 S.E.2d at 497; *Nixon*, ___ N.C. App. at ___, 823 S.E.2d at 692.

Here, the bill of information contained a waiver of indictment that was in writing and signed by Defendant; however, the waiver of indictment was not signed by Defendant's attorney. The absence of Defendant's attorney's signature on the waiver of indictment attached to the bill of information violates the requirements of N.C.G.S. § 15A-642. The trial court concluded that, despite the absence of Defendant's attorney's signature on the waiver of indictment, "the statutory requirements have been substantially met." This conclusion ignores the plain language of the statute, which clearly and unambiguously states the "[w]aiver of indictment *must* be . . . signed by the defendant *and his attorney*." N.C.G.S. § 15A-642(c) (2017) (emphasis added). The statute makes no exception for its requirement of a signature by a defendant's attorney, nor does the statute contain language that this requirement can be "substantially met." Rather, this requirement, and all others in N.C.G.S. § 15A-642(c), are "mandatory." *Nixon*, ___ N.C. App. at ___, 823 S.E.2d at 692. The waiver of indictment was thus rendered invalid without Defendant's attorney's signature, depriving the trial court of jurisdiction to accept Defendant's guilty plea and enter judgment. The trial court erred in denying Defendant's MAR.

CONCLUSION

The absence of Defendant's attorney's signature on the waiver of indictment attached to the bill of information rendered the waiver invalid, thus depriving the Superior Court of jurisdiction. Accordingly, we reverse the trial court's order denying Defendant's MAR on this

ground and remand with instructions to grant the MAR and vacate the judgment. We need not reach, and accordingly dismiss, Defendant's motion to arrest judgment made in the alternative.

REVERSED AND REMANDED; DISMISSED.

Judges DIETZ and COLLINS concur.

STATE OF NORTH CAROLINA
v.
BENJAMIN CURTIS LANKFORD, DEFENDANT

No. COA18-854

Filed 2 July 2019

Criminal Law—motion to withdraw guilty plea—filed after sentence known—standard—manifest injustice

The correct standard for analyzing a trial court's denial of a motion to withdraw a plea when a defendant has been informed of his or her sentence but the sentence has not yet been entered is whether manifest injustice will result if the motion is denied—not the more lenient standard stated in *State v. Handy*, 326 N.C. 532 (1990), which permits withdrawal of a plea upon any fair and just reason put forth by a defendant. In this case, the trial court's denial of defendant's motion to withdraw his plea of no contest—in which nine charges were dismissed in exchange for his plea to three charges—did not cause defendant manifest injustice where defendant was competently represented by counsel, he had already received some benefits from the plea, and his reconsideration was not an outright claim of actual innocence.

Appeal by Defendant from judgment entered 13 February 2018 by Judge Michael D. Duncan in Wilkes County Superior Court. Heard in the Court of Appeals 12 February 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Rory Agan, for the State.

Meghan Adelle Jones for defendant-appellant.

MURPHY, Judge.

Where a defendant moves to withdraw his plea of guilty or no contest before sentencing but after he has been informed of his sentence by the presiding judge, such motion need only be granted where a trial court's denial would result in a manifest injustice. Here, Defendant, Benjamin Curtis Lankford, moved to withdraw his plea of no contest more than two months after he was told his sentence by the trial court. The trial court's denial of Defendant's motion did not result in a manifest injustice, and is affirmed.

BACKGROUND

Defendant was indicted for fleeing to elude arrest, speeding, driving left of center, driving while license revoked, and attaining the status of habitual felon. On 3 February 2018, Defendant entered a plea of no contest to the charges of fleeing to elude arrest, driving while license revoked, and attaining habitual felon status. Nine other charges were dismissed in exchange for his plea. At this hearing, Defendant was advised that he would "be sentenced as a habitual felon at a Class D, prior record level VI, at the lowest end of the mitigated range not less than 77 months nor more than 105 months in the North Carolina Department of Adult Corrections." Defendant was granted pretrial release, and the matter was continued until 2 April 2018, when judgment was to be entered. Defendant failed to appear for his scheduled sentencing hearing, and an order for his arrest was issued on 9 April 2018.

On 8 May 2018, Defendant appeared before the Superior Court on a motion to withdraw his no contest plea. Defendant explained that he believed his plea agreement included a provision that allowed him to amend his plea "if there was any evidence that was brought forth of this case[,]" and that he wished to withdraw his plea. Defendant also told the trial court, "I'm not guilty of these charges that they've charged me with[.]" Defendant's counsel asked to respond to his client's statements and argued "the State could prove absolutely and without a doubt in [trial counsel's] opinion" that Defendant was guilty as charged. Defendant's counsel explained that Defendant was not claiming innocence regarding the charges he had pled to, but was "talking about the possession of a firearm by a felon [charge], one of the cases that would be dismissed [under his plea agreement]." Counsel further expressed that he had advised Defendant against filing a motion to withdraw his plea, and that, if the trial court granted the motion, counsel would need to withdraw his representation because there would be "a conflict that couldn't never [sic] be solved."

The trial court found that Defendant had received competent legal representation and had not been coerced into entering his original plea of no contest. Subsequently, the trial court concluded there was no fair and just reason that Defendant should be permitted to withdraw his plea and denied Defendant's motion to do so. The trial court entered judgment upon the plea of no contest and sentenced Defendant, as previously announced, to an active term of 77 to 105 months.

ANALYSIS

In his only argument on appeal, Defendant argues the trial court erred in denying his motion to withdraw his plea of no contest. Defendant contends the trial court was required to grant his motion because he presented a fair and just reason for withdrawal and the State did not allege or show any substantial prejudice which would have been caused by the withdrawal.

"While there is no absolute right to withdrawal of a guilty plea, withdrawal motions made prior to sentencing, and especially at a very early stage of the proceedings, should be granted with liberality[.]" *State v. Handy*, 326 N.C. 532, 537, 391 S.E.2d 159, 161-62 (1990) (internal citations omitted).

> In a case where the defendant seeks to withdraw his guilty plea before sentence, he is generally accorded that right if he can show any fair and just reason. On the other hand, where the guilty plea is sought to be withdrawn by the defendant after sentence, it should be granted only to avoid manifest injustice.

Id. at 536, 391 S.E.2d at 161 (quoting *State v. Olish*, 164 W.Va. 712, 715, 266 S.E.2d 134, 136 (1980)). Here, Defendant had not yet been sentenced, but had known his sentence for nearly three months before he moved to withdraw his plea of no contest.

During his February hearing, Defendant was advised by the trial court that he would "be sentenced as a habitual felon at a Class D, prior record level VI, at the lowest end of the mitigated range not less than 77 months nor more than 105 months in the North Carolina Department of Adult Corrections." We find this situation different from that in *Handy*, where the defendant attempted to withdraw his guilty plea before he became aware of his sentence. Indeed, in every case the parties cite in their briefs, and all of the cases found in our independent analysis of this issue, the defendant moved to withdraw his plea before he knew his sentence. *See*, *e.g.*, *Handy*, 326 N.C. at 534-35, 391 S.E.2d at 160; *State*

v. Meyer, 330 N.C. 738, 740, 412 S.E.2d 339, 340 (1992); *State v. Deal*, 99 N.C. App. 456, 457, 393 S.E.2d 317, 317 (1990). Whether to grant the level of deference from *Handy* in a case where the defendant moves to withdraw his plea prior to sentencing but after learning his sentence is a matter of first impression.

In *Handy*, the North Carolina Supreme Court reasoned: "A fundamental distinction exists between situations in which a defendant pleads guilty but changes his mind and seeks to withdraw the plea before sentencing and in which a defendant only attempts to withdraw the guilty plea after he hears and is dissatisfied with the sentence." *Handy*, 326 N.C. at 536, 391 S.E.2d at 161. In so reasoning, our Supreme Court recognized some key differences between these two situations:

> First, once sentence is imposed, the defendant is more likely to view the plea bargain as a tactical mistake and therefore wish to have it set aside. Second, at the time the sentence is imposed, other portions of the plea bargain agreement will often be performed by the prosecutor, such as the dismissal of additional charges or the return or destruction of physical evidence, all of which may be difficult to undo if the defendant later attacks his guilty plea. Finally, a higher post-sentence standard for withdrawal is required by the settled policy of giving finality to criminal sentences which result from a voluntary and properly counseled guilty plea.
>
> These considerations are not present where the defendant seeks to withdraw the guilty plea prior to sentencing.

Id. at 537, 391 S.E.2d at 161 (citing *Olish*, 164 W.Va. at 716, 266 S.E.2d at 136 (citation omitted)).[1] All three considerations are present here,

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1. We recognize that the *Olish* case, which underlies *Handy*, relies upon a since-supplanted federal standard in which "[A] motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; **but to correct manifest injustice** the Court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." *See* Fed. R. Crim. P. 32 advisory committee's notes (1983) (emphasis added). Since *Olish* was decided, the "manifest injustice" language has been removed, and a defendant may withdraw a guilty or nolo contendere plea "after the court accepts the plea, but before it imposes sentence if . . . the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2) (2019). In amending the rule, the Advisory Committee hoped to "avoid[] language [regarding manifest injustice] which has been a cause of unnecessary confusion." Fed. R. Crim. P. 32 advisory committee's notes (1983). However, *Handy* has not been overruled or distinguished by our Supreme Court, or the Supreme Court of the United

where Defendant already knew his sentence but was granted a continuance and presentence release. We hold that in such cases it is appropriate to review the trial court's denial of Defendant's motion only to determine whether it amounted to a manifest injustice, and not according to the "any fair and just reason" standard.

Inevitably, we look to similar factors to those described in our existing caselaw to determine whether a denial would amount to a manifest injustice. As is discussed in greater detail below, Defendant had already received part of the benefit of his plea agreement by the time he moved to withdraw it, did not protest his innocence of the charges to which he had already pled guilty, and failed to provide the trial court any other reason why his withdrawal was imperative. The trial court's denial of Defendant's motion does not amount to a manifest injustice.

Even assuming *arguendo* the fair and just standard does apply, Defendant's argument on appeal fails. We "must look to the facts of each case to determine whether a defendant has come forward with a fair and just reason to allow withdrawal of his guilty pleas." *Meyer*, 330 N.C. at 743-44, 412 S.E.2d at 343. Some factors we have considered are "whether the defendant has asserted legal innocence, the strength of the State's proffer of evidence, the length of time between entry of the guilty plea and the desire to change it, and whether the accused has had competent counsel at all relevant times." *Handy*, 326 N.C. at 539, 391 S.E.2d at 163. Here, after a careful review of the record before us, we cannot conclude Defendant offered a fair and just reason for withdrawing his plea, let alone that the trial court's denial of Defendant's motion resulted in a manifest injustice.

Regarding a protestation of innocence, Defendant told the trial court, "I'm not guilty of these charges that they've charged me with[.]" Although at first glance this appears to be a protestation of innocence, upon reading the entire record we cannot determine with clarity whether Defendant was claiming actual innocence of the charges to which he had pled no contest. After Defendant claimed he was not guilty of the charges, his counsel explained to the trial court, "he's talking about the possession of a firearm by a felon [charge], one of the cases that would be dismissed [under his plea agreement]." The closest Defendant comes to protesting his innocence of the charges to which he initially pled was explaining, "I just feel like if everything is brought out in every

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States, since it was published, and we remain bound by its holding. *See, e.g.*, *Mahoney v. Ronnie's Road Serv.*, 122 N.C. App. 150, 153, 468 S.E.2d 279, 281 (1996), *aff'd per curiam*, 345 N.C. 631, 481 S.E.2d 85 (1997).

case that every officer has charged me with, I know what I'm guilty of and I know what I'm not guilty of. I'm not guilty of all these charges." Reviewing the entire record, we are not convinced Defendant protested his innocence of the relevant charges in his motion to withdraw his plea.

As for the temporal factor, Defendant moved to withdraw his plea approximately ten weeks after he initially entered it. The timing of a motion for withdrawal in relation to the initial plea has received considerable attention by our appellate courts. For example, the defendant in *Handy*—who was allowed to withdraw his plea—moved to withdraw his plea less than 24 hours after he initially entered it. *Handy*, 326 N.C. at 534-35, 391 S.E.2d at 160. In *Meyer*, on the other hand, the defendant's motion to withdraw was denied in part because it was made almost four months after the defendant initially entered his plea. *Meyer*, 330 N.C. at 744, 412 S.E.2d at 343. However, in our Court's first case applying *Handy*, we reasoned "[a]lthough [the defendant] did not attempt to revoke his plea for over four months, this appears to have resulted from his erroneous expectations and lack of communication with his attorney." *Deal*, 99 N.C. App. at 464, 393 S.E.2d at 321 (reversing the trial court's denial of the defendant's motion to withdraw his plea). Even in applying the "fair and just reason" analysis *arguendo*, we would consider the unique fact that Defendant knew what his sentence would be when he moved to withdraw his plea, which demonstrates that his motion did not come "at a very early stage of the proceedings," as was the case in *Handy*, 326 N.C. at 537, 391 S.E.2d at 161-62. The timing of Defendant's motion to withdraw neither bolsters nor subverts his argument that he presented a fair and just reason.

Finally, Defendant argues his counsel was incompetent in representing him during the hearing regarding his motion to withdraw. We are admittedly concerned with defense counsel's balancing of his duty of candor to the tribunal with that of zealous representation during the withdrawal hearing, where he interrupted Defendant on multiple occasions and described to the trial court why he had advised Defendant against attempting to withdraw his plea. However, the record does not indicate Defendant's counsel provided incompetent representation throughout the process. Counsel filed Defendant's motion to withdraw his plea—despite the counselor's personal belief that the motion was meritless—and timely notice of appeal. Defendant was represented by competent counsel at all relevant times throughout this process.

In sum, Defendant did not suffer a manifest injustice when the trial court denied his motion to withdraw his no contest plea. Even applying the less deferential standard described by our Supreme Court in *Handy*,

we would not hold Defendant met his burden of showing that his motion to withdraw was made for a "fair and just reason." We affirm the trial court's denial of Defendant's motion to withdraw his plea.

CONCLUSION

The trial court's denial of Defendant's motion to withdraw his plea of no contest did not cause Defendant to suffer a manifest injustice. Furthermore, Defendant did not present the trial court with a fair and just reason to grant his motion.

AFFIRMED.

Judges BRYANT and DIETZ concur.

STATE OF NORTH CAROLINA
v.
EDWARD HAMILTON SOUTHERLAND

No. COA18-1134

Filed 2 July 2019

Indecent Liberties—with a child—attempt—steps beyond mere preparation—delivery of a letter

The State presented sufficient evidence from which a reasonable inference of defendant's guilt of taking or attempting to take indecent liberties with a child could be made, where defendant, a sixty-nine-year-old man, attempted to deliver a letter to an eleven-year-old child specifically requesting to have sex with her.

Appeal by defendant from judgment entered 21 February 2018 by Judge Richard Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 10 April 2019.

Attorney General Joshua H. Stein, by Assistant Attorney General Sherri Horner Lawrence, for the State.

Sarah Holladay for defendant-appellant.

BRYANT, Judge.

Where the evidence, when taken in the light most favorable to the State, was sufficient to show defendant attempted to engage in indecent liberties with a minor child, the trial court did not err in denying defendant's motion to dismiss.

On 21 February 2018, defendant Edward Hamilton Southerland, an elderly man, was tried by a jury and convicted in New Hanover County Superior Court before the Honorable R. Kent Harrell, Judge presiding, on the charge of taking indecent liberties with a child, eleven-year-old A.G.

The State presented evidence that A.G. and her grandmother went to University Arms Apartments to visit a relative. Defendant, who lived in the apartment across from A.G.'s relative, frequently interacted with A.G. and her grandmother, when they came to visit the relative.

On 27 February 2017, defendant gave A.G.'s grandmother a sealed envelope and directed her to deliver it to A.G. A.G.'s name was written on the front of the envelope. In the letter, defendant stated to A.G.:

> Dear [A.G.],
>
> Have you ever been offered something and not followed up on "it," only to wonder what would have happened "if" I had? That's how I have felt about the three balloons you gave me for my birthday, last year.
>
> When you moved, every day I think of you and those balloons. I miss you so much, yet the only thing I have are my memories of you. That makes me feel like the lonely old man that I am. I don't want to feel that way and the only thing that makes me feel young and alive is to wonder what "it" would be like to have sex with you. I'm within sight of being seventy years old and in good health. The only thing I need is a very pretty girl who knows me and likes me. Therefore, the only girl I could possibly like is you.

Defendant wrote at the bottom of the letter to A.G., "[p]lease do me the honor of having sex with me and help me to feel young again. Love, Mr. Ed[.]"

The next day, A.G.'s grandmother read the letter and immediately called the police. Detective Justin Ovaska of the Wilmington Police Department read the letter and went to defendant's apartment where defendant admitted that he wrote the letter to A.G.

At the close of the State's evidence, defendant moved to dismiss arguing that the State did not present substantial evidence that he was actually or constructively in the presence of A.G. Defendant's motion was denied. Defendant took the stand and testified that he "was so tired and lonely from trying to get help [for his post-traumatic stress disorder] that [he] just sat down and wrote [A.G.] a letter." After defendant rested his case, he renewed his motion to dismiss which the trial court denied.

Defendant was found guilty of taking indecent liberties with a child. The trial court sentenced defendant in accordance with the jury verdict, and defendant was ordered to register as a sex offender for thirty years. On 22 February 2018, defendant filed his notice of appeal.

On appeal, defendant argues the trial court erred by denying his motion to dismiss the charge of indecent liberties because the State did not present substantial evidence to support that he was "with" A.G. or that he took steps beyond mere preparation to complete the act. After careful consideration, we disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632¬–33, 669 S.E.2d 290, 294 (2008) (quotation marks omitted).

> When a defendant moves for dismissal, the trial court must determine whether there is substantial evidence of each essential element of the offense charged (or a lesser offense included therein), and of the defendant being the one who committed the crime. If that evidence is present, the motion to dismiss is properly denied. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
>
> In ruling on a motion to dismiss, the evidence must be considered by the court in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. Contradictions and discrepancies must be resolved in favor of the State, and the defendant's evidence, unless favorable to the State, is not to be taken into consideration. All evidence actually

> admitted, both competent and incompetent, which is favorable to the State must be considered

State v. Bullard, 312 N.C. 129, 160, 322 S.E.2d 370, 387–88 (1984) (internal citations and quotation marks omitted).

> Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.

State v. Fritsch, 351 N.C. 373, 379, 526 S.E.2d 451, 455 (2000) (internal citations and quotation marks omitted).

In the instant case, defendant was indicted for taking indecent liberties with a child in violation of section 14-202.1(a)(1) of our General Statutes. To be convicted of taking indecent liberties with a child: 1) the defendant must be at least sixteen years old, 2) the child must be under the age of sixteen, and 3) the defendant is at least five years older than the child in question. N.C. Gen. Stat. § 14-202.1(a) (2017). Additionally, a defendant is guilty of taking indecent liberties with a child under subsection (a)(1) if he "[w]illfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire[.]" *Id.* § 14-202.1(a)(1).

As defendant was convicted for indecent acts by delivery of a letter, our analysis, in this case, is controlled by *State v. McClary*, 198 N.C. App. 169, 173, 679 S.E.2d 414, 417 (2009). In *McClary*, the defendant delivered a sexually explicit letter to a fifteen-year-old requesting to have sex, and this Court considered whether the delivery of the letter with sexual language constituted a willful taking, or the attempt to take, indecent liberties with a child to withstand a motion to dismiss. This Court explained that:

> [i]ndecent liberties are defined as such liberties as the common sense of society would regard as indecent and improper. Neither a completed sex act nor an offensive

> touching of the victim are required to violate the statute. This Court has specifically rejected the argument that the utterance of 'mere words,' no matter how reprehensible, does not constitute the taking of an indecent liberty with a child.
>
> The State is required to show that the action by the defendant was for the purpose of arousing or gratifying sexual desire. *[A] variety of acts may be considered indecent and may be performed to provide sexual gratification to the actor.* Moreover, the variety of acts included under the statute demonstrate that the scope of the statute's protection is to encompass more types of deviant behavior and *provide children with broader protection than that available under statutes proscribing other sexual acts.*

Id. at 173–74, 679 S.E.2d at 417–18 (emphasis added) (internal citations and quotation marks omitted). This Court held that the State presented substantial evidence and stated, the "[d]efendant's actions of overtly soliciting sexual acts from [the victim] through the sexually explicit language contained in the letter [fell] within the broad category of behavior that the common sense of society would regard as indecent and improper." *Id.* at 174, 679 S.E.2d at 418.

Similarly, the delivery of a letter in *McClary* —the act found to be in violation of the statute—is indistinguishable as a matter of law from the act in the instant case. Here, the State's evidence established that defendant, who was sixty-nine years old, wrote a letter to A.G., an eleven-year-old, requesting sex to make him "feel young again" and attempted to deliver the letter to A.G. through her grandmother. A.G.'s grandmother testified that the sealed envelope from defendant was addressed to A.G. and that defendant specifically asked her to give the letter to A.G. Based on the evidence, we conclude that an attempt to carry out defendant's ultimate desired act—having sex with A.G.—was made upon delivery of the letter.

We mirror the sentiments of the *McClary* Court in finding that "the completion of defendant's ultimate desired act, [i.e.,] having sexual intercourse and oral sex [with the victim], was not required in order to allow the jury to reasonably infer that defendant's acts of writing and delivering the letter [to the victim] were for the purpose of arousing or gratifying sexual desire." *Id.* at 174, 679 S.E.2d at 418; *see also* N.C.G.S. § 14-202.1 (attempts to take as well as a completed act of taking indecent liberties with children are punishable the same by law). We recognize

that had A.G.'s grandmother not opened the letter and called the police, defendant's letter would have been successfully delivered to his intended recipient, A.G., and thus as in *McClary*, the evidence was sufficient to allow the jury to reasonably infer that defendant acted beyond mere words by delivering the letter expressing his intent to gratify his sexual desire.

Defendant argues that since he "gave his letter to an adult," the act did not constitute a violation under N.C.G.S. § 14-202.1. because A.G. did not receive the letter and he never "saw, heard, touched, or communicated with A.G." However, we reject his argument: as our Supreme Court has previously stated, "the statute does not contain any language requiring . . . the State prove that a touching occurred. Rather, the State *need only* prove the taking of any of the described liberties for the purpose of arousing or gratifying sexual desire." *State v. Hartness*, 326 N.C. 561, 567, 391 S.E.2d 177, 180–81 (1990) (emphasis added).

As our Court noted in *McClary*:

> The requirement that defendant's actions were for the purpose of arousing or gratifying sexual desire may be inferred from the evidence of the defendant's actions. In *State v. McClees*, this Court held that the defendant's act of secretly videotaping an undressed child was for the purpose of arousing or gratifying sexual desire even though no evidence was presented showing that the defendant ever actually viewed the video. Thus, the completion of the defendant's ultimate desired act, watching the video tape, was not required in order to allow the jury to reasonably infer that the defendant's acts of secretly setting up the video camera and arranging for the child to undress directly in front of the camera were for the purpose of arousing or gratifying sexual desire.

McClary, 198 N.C. App. at 174, 679 S.E.2d at 418 (internal citations and quotation marks omitted) (citing *State v. McClees*, 108 N.C. App. 648, 654–55, 424 S.E.2d 687, 690–91 (1993)). Therefore, we hold that defendant's actions in sending a letter with a specific request for delivery to A.G.—clearly expressing a desire to have sex with an underage child—was an attempt to take indecent liberties with a child under the statute.

Accordingly, based on the evidence presented at trial, when viewed in the light most favorable to the State, the trial court properly denied defendant's motion to dismiss as the State presented substantial

evidence to support each element of taking or attempting to take indecent liberties with a child.

NO ERROR.

Judges STROUD and COLLINS concur.

STATE OF NORTH CAROLINA
v.
HARVEY LEE STEVENS, JR., DEFENDANT

No. COA17-584

Filed 2 July 2019

Statutes of Limitation and Repose—criminal—misdemeanors—tolling—by valid criminal pleadings

The two-year statute of limitations for misdemeanors (N.C.G.S. § 15-1) did not bar prosecution where defendant was issued a citation for two counts of misdemeanor death by motor vehicle, a misdemeanor statement of charges was filed a little less than two years later, and a grand jury made a presentment and returned an indictment several months after the statement of charges while the action was pending in district court. The valid criminal pleadings (the citation and statement of charges) tolled the statute of limitations, so it was permissible for defendant to be indicted in superior court more than two years after he committed the offenses.

Appeal by the State from order entered 14 February 2017 by Judge Gregory R. Hayes in Catawba County Superior Court. Heard in the Court of Appeals 11 April 2019.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Christopher W. Brooks, for the State-appellant.

Blair E. Cody, III for defendant-appellee.

MURPHY, Judge.

Defendant, Harvey Lee Stevens, Jr., was charged by citation for two counts of misdemeanor death by motor vehicle. The State subsequently filed a misdemeanor statement of charges charging Defendant

with the same two offenses. While this action was pending in District Court, the grand jury made a presentment and subsequently returned an indictment for two counts of misdemeanor death by motor vehicle. Defendant moved to dismiss the charges in Superior Court, arguing the presentment and indictment were returned more than two years after the commission of the offense in violation of the statute of limitations for misdemeanors in N.C.G.S. § 15-1. The trial court allowed Defendant's motion.

A citation and misdemeanor statement of charges, as valid criminal pleadings, toll the two-year statute of limitations for misdemeanors set out in N.C.G.S. § 15-1. The statute of limitations remains tolled by the criminal pleadings while that action is pending. When a presentment and indictment are returned in Superior Court during the tolling period, N.C.G.S. § 15-1 does not bar prosecution based upon the indictment. We reverse the trial court's order allowing Defendant's motion to dismiss.

BACKGROUND

On 24 December 2013, Defendant was charged by *Citation* and *Magistrate's Order* with two counts of misdemeanor death by motor vehicle arising out of an accident on Interstate 40 in Catawba County. Defendant's case was pending in Catawba County District Court from this time until 21 December 2015, when a *Misdemeanor Statement of Charges* was filed charging Defendant with two counts of misdemeanor death by motor vehicle. The matter was continued in District Court on 3 March 2016 to 23 June 2016.

Before Defendant's charges were heard in the District Court on 23 June 2016, the grand jury in Catawba County made a *Presentment* for the two counts of misdemeanor death by motor vehicle on 7 March 2016 and subsequently returned an *Indictment* for the same charges on 21 March 2016. Defendant filed a *Motion to Dismiss* in Catawba County Superior Court, arguing "the statute of limitations ha[d] run" on the two offenses. The trial court allowed Defendant's motion, concluding the Defendant was charged with the two offenses by indictment "after the two[-]year statute of limitations had run" and that the "statute of limitations bars further prosecution on the Defendant." The State timely appealed.

ANALYSIS

The State argues the trial court erred in concluding the 21 March 2016 indictment charging Defendant with two counts of misdemeanor death by motor vehicle was returned after the two-year statute of

limitations. More specifically, it argues the statute of limitations from the date of offense was tolled by the misdemeanor statement of charges at the time the indictment was issued. Accordingly, it asserts it was not barred from issuing the indictment. We agree.

The State does not challenge any findings of fact in the trial court's order, so those findings of fact are binding on appeal. *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011). "Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal." *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* at 632-33, 669 S.E.2d at 294. Whether a defendant is entitled to dismissal of the charges against him or her is a conclusion of law. *Id.* at 632, 669 S.E.2d at 294.

N.C.G.S. § 15-1 sets forth the statute of limitations for misdemeanors. The version of the statute in effect from 1943 to 2017, the relevant time period for the events occurring herein, stated that "all misdemeanors except malicious misdemeanors, shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards[.]"[1] N.C.G.S. § 15-1 (2015). In *State v. Curtis*, 371 N.C. 355, 817 S.E.2d 187 (2018), our Supreme Court addressed the types of criminal pleadings required to toll the two-year statute of limitations in this version of the statute. In *Curtis*, the defendant was issued a citation for driving while impaired, and a magistrate's order was issued on that charge (among others). *Id.* at 356, 817 S.E.2d at 187-88. Over two years later, the defendant objected to trial on citation and moved to dismiss the charges. *Id.* at 356, 817 S.E.2d at 188. "In her motion [the] defendant argued that, because she was filing a pretrial objection . . . to trial on citation, the State typically would be required by the statute to file a statement of charges; however, because [N.C.G.S §] 15-1 establishes a two-year statute of limitations for misdemeanors, [the] defendant contended that her charges must be dismissed instead." *Id.*

Our Supreme Court disagreed with this argument and reversed the trial court's order allowing the defendant's motion to dismiss. It found that the citation, as a valid criminal pleading, tolled the two-year statute of limitations set out in N.C.G.S. § 15-1. The Court reasoned:

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1. N.C.G.S. § 15-1 has since been amended to provide that "all misdemeanors except malicious misdemeanors, shall be charged within two years after the commission of the same, and not afterwards." Act of Oct. 5, 2017, ch. 212, sec. 5.3, 2017 N.C. Sess. Laws 1565, 1579 (codified at N.C.G.S. § 15-1 (2017)).

> That citation was a constitutionally and statutorily proper criminal pleading that conveyed jurisdiction to the district court to try defendant for the misdemeanor crime charged. In light of our decision in *Underwood*, the changes to criminal procedure and to our court system since the enactment of section 15-1, as well as our understanding of the general purpose of a criminal statute of limitations, we hold that the citation issued to defendant tolled the statute of limitations here. We cannot conclude that the General Assembly intended the illogical result that an otherwise valid criminal pleading that vests jurisdiction in the trial court would not also toll the statute of limitations.

Id. at 362, 817 S.E.2d at 191.

In the case before us, a citation was issued on 24 December 2013 for two counts of misdemeanor death by motor vehicle, and a misdemeanor statement of charges was filed on 21 December 2015. As valid criminal pleadings under N.C.G.S. § 15A-921 that conveyed jurisdiction to the District Court, *Curtis* makes clear that this citation, and subsequently the misdemeanor statement of charges, tolled the two-year statute of limitations under N.C.G.S. § 15-1. Yet, this case presents an additional question not directly addressed in *Curtis*: whether the State may prosecute an offense in Superior Court upon an indictment returned more than two years after the commission of the offense but while a valid criminal pleading has tolled the statute of limitations. Defendant argues the indictment was a new criminal pleading that "annulled the criminal process initially instituted in District Court" and that, because it was returned more than two years after the commission of the offense, prosecution based on the indictment was barred by the statute of limitations. In contrast, the State argues "the statute of limitations was tolled by the citation and statement of charges and [it] was not barred from later seeking an indictment" while the statute of limitations was tolled by an active case in District Court. We agree with the State.

To "toll" the statute of limitations means to arrest or suspend the running of the time period in the statute of limitations. *See State v. Underwood*, 244 N.C. 68, 70, 92 S.E.2d 461, 463 (1956) (describing tolling as arresting the statute of limitations). In other words, the statute of limitations ceases to run while it is tolled. *See*, *e.g.*, *Chardon v. Fumero Soto*, 462 U.S. 650, 652, 77 L. Ed. 2d 74, 78 n.1 (1983) (describing tolling "to mean that, during the relevant period, the statute of limitations ceases to run"). Moreover, the statute of limitation continues to be tolled "as long as the action is alive . . . ." *See Long v. Fink*, 80 N.C. App. 482, 485, 342 S.E.2d 557, 559 (1986).

The citation and magistrate's order for two counts of misdemeanor death by motor vehicle commenced an action in District Court and, for the reasons discussed above, tolled the two-year statute of limitations in N.C.G.S. § 15-1. The misdemeanor statement of charges continued to toll the statute of limitations. While that action based upon the misdemeanor statement of charges was pending, the statute of limitations remained tolled. The statute of limitations was suspended and ceased to run during the pendency of this action. When the presentment was made and subsequent indictment was returned in Superior Court, the action based upon the original citation and magistrate's order and the later misdemeanor statement of charges was still pending. There is nothing in the record to indicate that action had been dismissed or abandoned by the State when the presentment and indictment were returned. Thus, at the time the Superior Court obtained jurisdiction through the presentment and indictment, the statute of limitations in N.C.G.S. § 15-1 was suspended and could not bar prosecution.

Defendant argues that the presentment and indictment initiated a new proceeding and "annulled the criminal process" in District Court based on the citation. Accordingly, he argues the two-year statute of limitations was not tolled when the Superior Court obtained jurisdiction through the presentment and indictment and barred prosecution. This argument is unavailing. The Superior Court may acquire jurisdiction of a misdemeanor "in any action *already properly pending in the [D]istrict [C]ourt* if the grand jury issues a presentment and that presentment is the first accusation of the offense within superior court." *State v. Gunter*, 111 N.C. App. 621, 624, 433 S.E.2d. 191, 193 (1993) (emphasis added); *see also State v. Cole*, ___ N.C. App. ___, 822 S.E.2d 456 (2018) (Superior Court held concurrent jurisdiction with the District Court over a DWI charge when the grand jury returned a presentment and subsequent indictment). If an action in District Court was properly pending, as it was here, the statute of limitations continued to be tolled.

CONCLUSION

The statute of limitations in N.C.G.S. § 15-1 was tolled at the time the grand jury returned a presentment and subsequent indictment and, therefore, did not bar prosecution based on this indictment in Superior Court. We reverse the trial court's order allowing Defendant's motion to dismiss.

REVERSED AND REMANDED.

Judges DIETZ and ZACHARY concur.

WELLS FARGO BANK, N.A., PLAINTIFF
v.
FRANCES J. STOCKS, IN HIS CAPACITY AS THE EXECUTOR OF THE ESTATE OF LEWIS H. STOCKS AKA LEWIS H. STOCKS, III, TIA M. STOCKS AND JEREMY B. WILKINS, IN HIS CAPACITY AS COMMISSIONER, DEFENDANTS

No. COA18-1171

Filed 2 July 2019

1. Appeal and Error—interlocutory orders—substantial right—judicial foreclosure of party's home

A partial summary judgment order directing the judicial sale of defendant's home was immediately appealable as affecting a substantial right that would be lost absent appellate review.

2. Statutes of Limitation and Repose—applicable limitations period—action for reformation and judicial foreclosure—defective deed of trust

Where defendant executed a deed of trust that, due to an error, failed to secure her debt to a bank, the bank's action for reformation of the deed and judicial foreclosure of defendant's home was time barred because the statute of limitations for actions based upon sealed instruments or instruments conveying a real property interest (N.C.G.S § 1-47(2)) applied rather than the statute of limitations for claims arising from mistake (N.C.G.S § 1-52(9)), and the bank filed its action two years after the limitations period had expired (or twelve years after defendant executed the deed).

3. Judicial Sales—defective deed of trust—unsecured promissory note—claim for judicial foreclosure—invalid

The trial court erred in granting summary judgment in favor of a bank on its claim for judicial sale of defendant's home because, due to an error, defendant executed a deed of trust that failed to secure her debt to the bank.

Judge ARROWOOD dissenting.

Appeal by Defendant Tia M. Stocks from summary judgment entered 25 April 2018 by Judge Henry W. Hight in Wake County Superior Court. Heard in the Court of Appeals 25 April 2019.

The Law Office of John T. Benjamin, Jr., P.A., by John T. Benjamin, Jr., and Aleksandra E. Anderson, for Plaintiff-Appellee.

Janvier Law Firm, PLLC, by Kathleen O'Malley, for Defendant-Appellant Tia M. Stocks.

Howard, Stallings, From, Atkins, Angell & Davis, P.A., by Douglas D. Noreen and Rebecca H. Ugolick, for Defendant-Appellant Frances J. Stocks, in his Capacity as the executor of the estate of Lewis H. Stocks.

No brief filed by Defendant Jeremy B. Wilkins.

INMAN, Judge.

Defendant-Appellant Tia M. Stocks ("Ms. Stocks") appeals from the trial court's entry of summary judgment reforming a deed of trust and ordering judicial foreclosure in favor of Plaintiff-Appellee Wells Fargo, N.A. ("Wells Fargo"). Following careful review, we reverse the trial court's entry of summary judgment and hold Wells Fargo's reformation action is barred by the applicable statute of limitations.

I. Factual and Procedural History

On 22 March 2002, Ms. Stocks' father, Lewis H. Stocks ("Mr. Stocks"), executed a Limited Power of Attorney naming Ms. Stocks attorney-in-fact for the limited purpose of executing certain documents necessary to purchase a house in Garner, North Carolina (the "Property"), for Ms. Stocks' use as a residence. Mr. Stocks arranged to purchase the property through a loan with First Union National Bank ("First Union"), and a general warranty deed conveying the Property to Ms. Stocks—as sole owner—was filed on 26 March 2002. Consistent with her father's loan arrangement, Ms. Stocks executed a promissory note as attorney-in-fact for Mr. Stocks in First Union's favor in the amount of $88,184.50 (the "First Note") on 27 March 2002; she also recorded a deed of trust for that amount (together with the First Note as the "First Loan") that same day, which named herself and her father as borrowers and listed First Union as the beneficiary.

Before the First Note was paid off, First Union became Wachovia; Wachovia, in turn, became holder of the First Note. In late 2004, Mr. Stocks sought to refinance the First Loan with Wachovia and, on 12 January 2005, executed a new promissory note for $83,034.00 in Wachovia's favor (the "Note"). Ms. Stocks was not named as a borrower on the Note. On 19 January 2005, Ms. Stocks executed a new deed of trust with Wachovia under seal (the "Deed of Trust"), listing her as the borrower and stating

she was "indebted to [Wachovia] in the principal sum of U.S.$ 83034.00 which indebtedness is evidenced by Borrower's Note dated 01/12/05." Because Ms. Stocks was not a signatory to or debtor under the Note, the language of the Deed of Trust mistakenly secured a non-existent debt. Ms. Stocks, however, made payments on the Note.

By 2016, Wachovia had merged with Wells Fargo, Mr. Stocks had passed away, and Ms. Stocks had ceased paying the Note. Wells Fargo sent a right to cure letter to Mr. Stocks' estate (the "Estate") on 2 March 2016, but no further payments were forthcoming. Wells Fargo thereafter commenced non-judicial foreclosure proceedings on the Property; during the course of those proceedings, Wells Fargo learned for the first time that, because of the mistake in the Deed of Trust, the Note was not secured by the Property.

To correct the error, Wells Fargo filed a complaint on 26 May 2017 requesting reformation of the Deed of Trust and a judicial sale of the Property; in the alternative, Wells Fargo requested imposition of an equitable lien on the Property. The complaint also alleged a breach of contract against the Estate for its default on the Note, as well as claims for quiet title and declaratory judgment that would establish the Deed of Trust as a valid lien on the Property as security for the Note.[1]

Ms. Stocks filed an answer to Wells Fargo's complaint asserting the statute of limitations as a defense to reformation. The Estate filed its answer and crossclaims against Ms. Stocks for breach of contract, unjust enrichment, and unfair and deceptive trade practices. Following further pleading and discovery, Wells Fargo moved for summary judgment on all claims.

At the summary judgment hearing, Wells Fargo contended that Ms. Stocks' statute of limitations defense, premised on Section 1-52(9), failed as a matter of law. That statute, which applies to claims arising from mistake, does not begin to run until the claimant "actually learns of [the mistake's] existence or should have discovered the mistake in the exercise of due diligence[,]" *Wells Fargo Bank, N.A. v. Coleman*, 239 N.C. App. 239, 244, 768 S.E.2d 604, 608 (2015) (citation omitted), and Wells Fargo asserted that Ms. Stocks had failed to forecast any evidence demonstrating that the mistake was or should have been discovered

1. Defendant Jeremy B. Wilkins was named in Wells Fargo's complaint for the sole purpose of allowing the trial court to appoint him as commissioner over any subsequent judicial foreclosure sale. He has not made an appearance in this appeal and is not discussed in the parties' arguments; as a result, we omit him from further discussion.

more than three years prior to suit. Counsel for Ms. Stocks argued that Wells Fargo should have discovered the mistake at the time the Deed of Trust was executed. The trial court rejected Ms. Stocks' statute of limitations argument and entered summary judgment for Wells Fargo on its claims for reformation and judicial foreclosure. Ms. Stocks appeals.

II. Analysis

A. Appellate Jurisdiction

[1] The trial court's summary judgment order did not fully resolve Wells Fargo's claims against the Estate or the Estate's crossclaims against Ms. Stocks; as a result, it is an interlocutory order. *See Atkins v. Beasley*, 53 N.C. App. 33, 36, 279 S.E.2d 866, 869 (1981). Such an order is immediately appealable if it "deprives the appellant of a substantial right which would be lost absent immediate review." *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995) (citation omitted); *see also* N.C. Gen. Stat. §§ 7A-27(a)(3)(a) and 1-277(a) (2017). "The moving party must show that the affected right is a substantial one, and that deprivation of that right, if not corrected before appeal from final judgment, will potentially injure the moving party. Whether a substantial right is affected is determined on a case-by-case basis, and should be strictly construed." *Alexander Hamilton Life Ins. Co. of America v. J & H Marsh & McClennan, Inc.*, 142 N.C. App. 699, 701, 543 S.E.2d 898, 900 (2001) (citations omitted).

Ms. Stocks argues that because the summary judgment orders the sale of her primary residence, if the appeal is not heard and the foreclosure moves forward, she may lose her home permanently prior to any appeal from final judgment. Wells Fargo and the Estate present no argument to the contrary. We hold the summary judgment order directing the judicial sale of Ms. Stocks' home affects a substantial right subject to appellate review. *Cf. Soares v. Soares*, 86 N.C. App. 369, 370, 357 S.E.2d 418, 418 (1987) (holding an interlocutory order in a divorce action that directed the sale of the marital home involved a substantial right subject to immediate appeal).

B. Standard of Review

We review the grant of summary judgment *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). This standard of review also encompasses the application of the appropriate statute of limitations where the relevant facts are undisputed. *McKoy v. Beasley*, 213 N.C. App. 258, 262, 712 S.E.2d 712, 715 (2011).

C. Applicable Statute of Limitations

[2] The parties noted in their briefs that resolution of this appeal requires consideration of two different statutes of limitations. The first, Section 1-52(9), provides a three-year limitation on actions "[f]or relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." N.C. Gen. Stat. § 1-52(9) (2017). The second statute, Section 1-47(2), provides a ten-year limitation on actions "[u]pon a sealed instrument or an instrument of conveyance of an interest in real property, against the principal thereto." N.C. Gen. Stat. § 1-47(2) (2017). Although both statutes were mentioned as potentially applicable in the hearing before the trial court, substantive argument below focused only on Section 1-52(9).

On appeal, Ms. Stocks argues that she raised a genuine issue of material fact as to when Wells Fargo should have discovered the mistake in the Deed of Trust, and, as a result, whether the three-year statute of limitations in Section 1-52(9) bars Wells Fargo's reformation claim. She bases this argument on evidence tending to show that: (1) Wachovia (now Wells Fargo) drafted other documents, simultaneous with the Deed of Trust, that properly described Mr. and Ms. Stocks' relationships with Wachovia; and (2) no Wachovia representative was present when Ms. Stocks signed the Deed of Trust. The trial court may very well have been correct in rejecting that argument, as the evidence cited does not suggest the existence of "facts and circumstances sufficient to put [Wells Fargo] on inquiry which, if pursued, would lead to the discovery of the facts constituting the [mistake]." *Coleman*, 239 N.C. App. at 245, 768 S.E.2d at 609 (citations omitted). We do not resolve whether the trial court properly concluded Ms. Stocks' limitations defense under Section 1-52(9) failed as a matter of law, however, because precedent established after the trial court's ruling, and before this Court's appellate review, held that Section 1-52(9) does not apply to a claim to reform a deed of trust based on mistake.

After the trial court granted summary judgment in favor of Wells Fargo, this Court issued its opinion in *Nationstar Mortgage, LLC v. Dean*, ___ N.C. App. ___, 820 S.E.2d 854 (2018), holding that a claim to reform a deed of trust on grounds of mistake is subject to the ten-year statute of limitations found in Section 1-47(2), *not* Section 1-52(9). ___ N.C. App. at ___, 820 S.E.2d at 860.

Neither party disputes that *Nationstar Mortgage* and Section 1-47(2) govern this appeal. In its principal brief, appellee Wells Fargo expressly

argues that "the applicable statute of limitations here as prescribed by *Nationstar Mortgage* is the ten-year statute under [Section] 1-47(2)." Although Ms. Stocks argued in her principal appellate brief that our consideration of the applicable statute of limitations should be limited to Section 1-52(9), she addressed Wells Fargo's contention in her reply brief by positing that if Wells Fargo is correct that the ten-year statute of limitations applies, Section 1-47(2) bars Wells Fargo's claim.

Consistent with *Nationstar Mortgage*, we hold that Section 1-47(2) governs Wells Fargo's reformation claim. Thus, although the trial court may very well have properly determined that Section 1-52(9) did not bar summary judgment in favor of Wells Fargo, that determination is immaterial if, following *Nationstar Mortgage*, Section 1-47(2) applies to the exclusion of Section 1-52(9).

In *Nationstar Mortgage*, a married couple defaulted on a loan secured by a deed of trust; however, the deed of trust was recorded without a legal description of the real property it encumbered. ___ N.C. App. at ___, 820 S.E.2d at 856-57. Nationstar, the servicer of the defaulted loan, brought a declaratory judgment and reformation action on the ground of mistake, requesting the trial court reform the deed of trust to accurately describe the real property. *Id.* at ___, 820 S.E.2d at 857. The borrowers raised a statute of limitations defense, but the trial court rejected that defense and entered summary judgment reforming the deed of trust. *Id.* at ___, 820 S.E.2d at 858. On appeal, the borrowers argued that Nationstar's claim was barred by Section 1-52(9), while Nationstar asserted the ten-year statute of limitations in Section 1-47(2) controlled. *Id.* at ___, 820 S.E.2d at 860.

To resolve that dispute, this Court looked to the "well-stablished canons of statutory construction," and observed that " '[w]hen two statutes apparently overlap, it is well established that the statute special and particular shall control over the statute general in nature, even if the general statute is more recent, unless it clearly appears that the legislature intended the general statute to control.' " *Id.* at ___, 820 S.E.2d at 860 (quoting *Fowler v. Valencourt*, 334 N.C. 345, 349, 435 S.E.2d 530, 533 (1993)). After acknowledging the deed of trust in question was "clearly a sealed instrument . . . 'of conveyance of an interest in real property[,]' " we held that "[a]s between N.C. Gen. Stat. §§ 1-47(2) and 1-52(9), the former is the more specific statute of limitations that applies to Nationstar's reformation claim under the ten-year limitations period." *Id.* at ___, 820 S.E.2d at 860 (quoting N.C. Gen. Stat. § 1-47(2)).

Given that "where two statutes deal with the same subject matter, the more specific statute *will prevail over* the more general one," *Fowler*, 334 N.C. at 349, 435 S.E.2d at 532 (emphasis added), and *Nationstar Mortgage*, relying on that canon, expressly held that "[a]s between N.C. Gen. Stat. §§ 1-47(2) and 1-52(9), the former is the more specific statute of limitations that applies to Nationstar's reformation claim[,]" ___ N.C. App. at ___, 820 S.E.2d at 860, we hold that Section 1-47(2) applies to Wells Fargo's claim while Section 1-52(9) does not.[2] We note that neither the parties nor the trial court had the benefit of this Court's decision in *Nationstar Mortgage* when the matter was resolved below.

D. Accrual of the Limitations Period Provided by Section 1-47(2)

Having held that the ten-year statute of limitations provided by Section 1-47(2) applies to Wells Fargo's reformation claim, we must now determine whether that claim was brought within the limitations period.

North Carolina common law provides that, for statute of limitations purposes, "a cause of action accrues at the time the injury occurs[,] . . . *even when the injured party is unaware that the injury exists*[.]" *Pembee Mfg. Corp. v. Cape Fear Const. Co.*, 313 N.C. 488, 492, 329 S.E.2d 350, 353 (1985) (citations omitted) (emphasis added). In other words, "[a] cause of action generally accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises." *Penley v. Penley*, 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985) (citations omitted). This common law rule may be modified by express statutory language delaying accrual until the party discovers or reasonably should discover the injury or mistake giving rise to the cause of action. *See, e.g.*, *Pembee Mfg. Corp.*, 313 N.C. at 492, 329 S.E.2d at 353 (noting that the common law rule ordinarily applies but recognizing that the discovery provisions found in various subsections of Section 1-52 modify the common law by delaying accrual until the injury is discovered or reasonably should

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2. We read *Nationstar Mortgage* to hold that Section 1-47(2) applies to the exclusion of 1-52(9) with respect to claims for reforming a sealed instrument based on mistake. The parties do not identify, and we have not found, any cases holding that more than one statute of limitations can apply to a claim. Nor have we located any decisions holding that where one statute of limitations—established by law as applicable to the action—has run on a claim, a different statute of limitations may step in and save the cause of action. Such paucity is not entirely surprising, given "that statutes of limitations are inflexible and unyielding[,]" and seek "to afford security against demands . . . . This security must be jealously guarded[.]" *King v. Albemarle Hosp. Auth.*, 370 N.C. 467, 470, 809 S.E.2d 847, 848 (2018) (internal quotation marks and citations omitted). We note that Wells Fargo's appellate brief speaks in exclusive terms when it states "the applicable statute of limitations here as prescribed by *Nationstar Mortgage* is the ten-year statute under [Section] 1-47(2)."

have been discovered); *Leonard v. England*, 115 N.C. App. 103, 107, 445 S.E.2d 50, 52 (1994) (observing that Section 1-52(16)'s "discovery" provisions extend the statute of limitations by delaying accrual "until bodily harm to the claimant . . . becomes apparent or ought reasonably to have become apparent to the claimant" (citation and internal quotation marks omitted)).

Although Section 1-52(9) contains language modifying the common law accrual rule, Section 1-47(2) does not. Thus, the common law rule applies to reformation actions governed by Section 1-47(2). *Pembee Mfg. Corp.*, 313 N.C. at 492, 329 S.E.2d at 353. And, when tasked in *Nationstar Mortgage* with determining whether the action to reform a deed of trust for mistake was brought within the ten-year limitations period, this Court held that claim accrued not at the time the mistake in the deed of trust was discovered, but when the deed of trust itself was executed. ___ N.C. App. at ___, 820 S.E.2d at 860 ("No genuine issue of material fact exists that Nationstar filed its verified complaint on 26 June 2013, which is within ten years *of the execution of* the First South Deed of Trust on 1 June 2004." (emphasis added)). Consistent with the application of Section 1-47(2) in *Nationstar Mortgage*, we hold that Wells Fargo's claim accrued on—and the statute of limitations runs from—the date the Deed of Trust was executed. *See id.* at ___, 820 S.E.2d at 860; *see also* 66 Am. Jur. 2d Reformation of Instruments § 89 ("[S]ome states apply the general rule that the statute commences to run at the accrual of the cause of action [for reformation on grounds of mistake], that is, at the date of the execution or delivery of the instrument, sometimes on the theory that the statute has made no [discovery] exception in this class of cases.").

It is undisputed that the Deed of Trust was executed by Ms. Stocks in January 2005 and that Wells Fargo filed its complaint twelve years later, on 26 May 2017. Wells Fargo's claim for reformation, then, was filed two years after the limitations period provided by Section 1-47(2) had expired. *See Nationstar Mortgage*, ___ N.C. App. at ___, 820 S.E.2d at 860. As a result, Wells Fargo's reformation claim is time barred.

Our dissenting colleague would not consider whether Section 1-47(2) bars Wells Fargo's claim because Ms. Stocks, the appellant, did not present this argument in her principal brief. The dissent cites well-established authority that it is not the role of the appellate court to create an argument for the appellant, and that a reply brief cannot correct deficiencies in the principal brief. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005); *Cox v. Town of Oriental*, 234 N.C. App. 675, 678, 759 S.E.2d 388, 390 (2014). But the procedural posture

of the issue before us is different and such that we cannot ignore it. That is because Wells Fargo's principal brief asserted that the limitations period provided by Section 1-47(2)—and not Section 1-52(9)—applies here, contending that question is ripe for consideration on appeal. The argument raised by Ms. Stocks in reply—that if Wells Fargo was correct about the applicable statute, it nonetheless barred Wells Fargo's claim—was responsive to Wells Fargo's argument. Rule 28(h) of the North Carolina Rules of Appellate Procedure provides that a reply brief shall be limited to "a concise rebuttal of arguments set out in the appellee's brief and shall not reiterate arguments set forth in the appellant's principal brief." N.C. R. App. P. 28(h) (2019). Ms. Stock's reply brief did not violate the rule, and we should not ignore her argument.

The trial court's entry of summary judgment in favor of Wells Fargo on this claim is reversed.

E. Judicial Sale

[3] Because the unreformed Deed of Trust fails to secure the Note, Wells Fargo's claim for judicial sale cannot stand. *See*, *e.g.*, *United States Bank Nat'l Ass'n v. Pinkney*, 369 N.C. 723, 727, 800 S.E.2d 412, 416 (2017) (recognizing that a valid claim for judicial foreclosure requires "a debt, default on the debt, a deed of trust securing the debt, and the plaintiff's right to enforce the deed of trust" (citation omitted)). Entry of summary judgment on this claim in favor of Wells Fargo is similarly reversed.

III. CONCLUSION

For the foregoing reasons, the trial court's entry of summary judgment in favor of Wells Fargo on its claims for reformation and judicial foreclosure is reversed. This matter is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judge BROOK concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

I respectfully dissent.

Tia M. Stocks ("defendant-appellant") argues on appeal that the trial court erred by granting summary judgment in plaintiff's favor because

she raised a genuine issue of material fact as to when Wells Fargo Bank, N.A. ("plaintiff") should have discovered the mistake in the deed of trust. As a result, she argues, there is a genuine issue of material fact as to whether the action is time barred under N.C. Gen. Stat. § 1-52(9) (2017). However, the majority concludes it does not need to resolve defendant-appellant's argument as raised on appeal because, subsequent to the trial court's summary judgment order, this Court decided *Nationstar Mortg., LLC v. Dean*, __ N.C. App. __, 820 S.E.2d 854 (2018), wherein our court determined N.C. Gen. Stat. § 1-52(9) does not apply to a claim to reform a deed of trust based on mistake.

In *Nationstar Mortg., LLC*, our Court considered whether the three-year statute of limitations in N.C. Gen. Stat. § 1-52(9) for claims based in "fraud or mistake" or the ten-year statute of limitations in N.C. Gen. Stat. § 1-47(2) (2017), for actions "[u]pon a sealed instrument or an instrument of conveyance of an interest in real property, against the principal thereto[,]" applies to a claim to reform a deed of trust based on mistake. *Nationstar Mortg., LLC*, __ N.C. App. at __, 820 S.E.2d at 860. Our Court explained that, although the statute of limitations in both N.C. Gen. Stat. §§ 1-47(2) and 1-52(9) could apply to the facts before the court, "[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." *Id.* The Court then determined, without citing any supporting justification, that "[a]s between N.C. Gen. Stat. §§ 1-47(2) and 1-52(9), the former is the more specific statute of limitations that applies to" a reformation claim involving a deed of trust that is "clearly a sealed instrument . . . 'of conveyance of an interest in real property[.]' " *Id.*

Applying *Nationstar Mortg., LLC*'s holding to the case at bar, the majority concludes that, because N.C. Gen. Stat. § 1-52(9) does not apply to a claim to reform a deed of trust based on mistake, it will consider defendant-appellant's arguments in light of N.C. Gen. Stat. § 1-47(2). I disagree with the majority's approach. It is well-established that "[i]t is not the role of the appellate court . . . to create an appeal for an appellant." *Viar v. N. Carolina Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005); *see* N.C.R. App. Pro. 28(b)(6) (2019) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Therefore, because the appellant did not raise the issue analyzed by the majority—whether there is a genuine issue of material fact as to whether the action is time barred under N.C. Gen. Stat. § 1-47(2)—we should not address it on appeal. Furthermore, in her opening brief, defendant-appellant specifically

argues the opposite, maintaining that N.C. Gen. Stat. § 1-47(2) is not the relevant statute of limitations. Thus, any argument otherwise has been waived.

Additionally, *Nationstar Mortg., LLC* was published prior to defendant's filing of her principal brief, and she even cites to it to define reformation, and to discuss, in a footnote, whether reformation of a deed of trust is an issue for the court or the jury. Nevertheless, she does *not* argue that our Court should consider this case in light of the ten-year statute of limitations in N.C. Gen. Stat. § 1-47(2), as described by *Nationstar Mortg., LLC*. Thus, I contend it is not proper for us to consider the argument posited by the majority on appeal.

Despite her argument in her opening brief, I do note that defendant's reply brief does argue that plaintiff's claim for reformation is barred under *both* N.C. Gen. Stat. §§ 1-47(2) and 1-52(9). Even so, this argument is not properly before our Court because "[a] reply brief does not serve as a way to correct deficiencies in the principal brief." *Cox v. Town of Oriental*, 234 N.C. App. 675, 679, 759 S.E.2d 388, 390 (2014) (alteration in original) (citation and quotation marks omitted). Accordingly, I dissent.

Furthermore, I believe it is problematic to determine that claims cannot be brought under N.C. Gen. Stat. § 1-52(9) in actions arising out of a sealed instrument or an instrument of conveyance of an interest in real property, against the principal thereto. Under North Carolina law, a cause of action based on fraud or mistake does not accrue until the aggrieved party discovers the facts constituting the fraud. N.C. Gen. Stat. § 1-52(9); *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C. App. 477, 485, 593 S.E.2d 595, 601 (2004) ("The Supreme Court of our State has held in numerous cases that in an action grounded on fraud, the statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence." (citation and quotation marks omitted)). However, under *Nationstar Mortg. LLC*, a cause of action based on fraud or mistake cannot be brought after ten years even if the underlying fraud or mistake would not have been reasonably discovered during that time.

I do not believe this result was the intent of N.C. Gen. Stat. § 1-47(2), where both our General Assembly and judiciary have emphasized the importance of protecting defrauded parties, or those injured by a mistake, by holding that a cause of action for these injuries does not accrue until the discovery of the fraud or mistake in the exercise of reasonable diligence. After all, determining "[w]hen plaintiff should, in the exercise of reasonable care and due diligence, have discovered the fraud is" not a

matter of law, but, rather, "a question of fact to be resolved by the jury." *Hunter*, 162 N.C. App. at 486, 593 S.E.2d at 601 (alteration in original) (citation and internal quotation marks omitted). Thus, I believe it runs counter to logic and our case law interpreting N.C. Gen. Stat. § 1-52(9) to bar an action for mistake or fraud from accruing after ten years pursuant to N.C. Gen. Stat. § 1-47(2) simply because the document at issue is a sealed instrument or an instrument of conveyance of an interest in real property.

For the foregoing reasons, I respectfully dissent.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 JULY 2019)

ATKINS v. TOWN OF WAKE FOREST No. 18-1167	Wake (16CVS14254)	Affirmed
COOPER v. ISMAIL No. 18-1166	New Hanover (13CVD1585)	Affirmed in part; Dismissed in part.
IN RE DAVIS No. 18-882	Davidson (15SP567)	Affirmed
IN RE K.W. No. 19-164	Burke (18SPC50079)	Affirmed
IN RE MADARA No. 19-26	Mecklenburg (18CVS15381)	Reversed and Remanded
JOHNSON v. PG MGMT. GRP., LLC No. 18-1262	Mecklenburg (17CVS3348)	Affirmed
MORTON v. COMBS No. 18-689	Pitt (12CVD2096)	Affirmed
ONIZUK v. ONIZUK No. 18-461	Craven (16CVD319)	Affirmed in Part; Reversed in Part; and Remanded.
SOLESBEE v. BROWN No. 18-842	Buncombe (15SP16)	Affirmed
STATE v. BAIR No. 18-830	Haywood (16CRS52442) (16CRS763)	No Error
STATE v. BLAKESLEE No. 18-974	Pitt (15CRS59761)	Affirmed in Part; Reversed in Part; Remanded for Further Proceedings
STATE v. BUNCH No. 18-1287	Lincoln (16CRS52376) (17CRS161)	No Error
STATE v. CAMPBELL No. 18-883	New Hanover (17CRS52696) (17CRS52933)	Affirmed
STATE v. CHERRY No. 18-619	Durham (16CRS54432)	No Error

STATE v. FOSTER No. 18-975	Pitt (15CRS3582) (15CRS58947)	AFFIRMED IN PART; REVERSED IN PART; REMANDED FOR FURTHER PROCEEDINGS.
STATE v. GOFORTH No. 18-851	Iredell (15CRS55301)	Affirmed
STATE v. GUTIERREZ No. 18-733	Gaston (16CRS64486-87)	No Error
STATE v. HARRIS No. 18-952	Granville (02CRS51192)	Reversed
STATE v. MILLER No. 18-1041	Forsyth (17CRS1516) (17CRS52826)	No Error
STATE v. MILLER No. 18-904	Alamance (17CRS1643-44)	NO ERROR IN PART, DISMISSED WITHOUT PREJUDICE IN PART.
STATE v. RADFORD No. 18-609	Jackson (16CRS51386)	Affirmed in part; Vacated in part and remanded for resentencing.
STATE v. REAVES-SPELLER No. 18-972	Pitt (17CRS1092)	AFFIRMED IN PART; REVERSED IN PART; REMANDED FOR FURTHER PROCEEDINGS.
STATE v. SCOTT No. 19-61	Guilford (18CRS24282) (18CRS68561-65)	No Error
STATE v. STARK No. 18-802	Forsyth (16CRS53157)	Affirmed in Part; No Plain Error in Part; Dismissed in Part.
STATE v. STEVENS No. 18-983	New Hanover (11CRS57565) (16CRS56954)	Affirmed
STATE v. WINFIELD No. 19-56	Edgecombe (16CRS53420) (18CRS105-08)	Affirmed in part; dismissed in part.

WALLACE v. WALLACE No. 19-77	Cabarrus (16CVD1863)	Dismissed

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